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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 579

UNION OIL COMPANY OF CALIFORNIA

and

LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

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No.

UNION OIL COMPANY OF CALIFORNIA

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LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners herein, Union Oil Company of California and Louisiana Land and Exploration Company, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered June 30, 1956 in the above-captioned case.

OPINIONS BELOW

The majority opinions of the United States Court of Appeals, Fifth Circuit, in *Union Oil Company of California and Louisiana Land and Exploration Company* v. *Federal Power Commission,* No. 15461, and the dissenting opinion therein of Brown, Circuit Judge, in this and companion cases and the majority opinions in the companion cases of *Magnolia Petroleum Company* v. *Federal Power Commission,* No. 15320, *The Ohio Oil Company* v. *Federal Power Commission,* No. 15321, *The Superior Oil Company* v. *Federal Power Commission,* No. 15352, *Wesley West* v. *Federal Power Commission,* No. 15354, and *Humble Oil and Refining Company* v. *Federal Power Commission,* No. 15704, are not yet reported. They are reproduced herein in the Appendix (App. 1-a, *et seq.*). The petition for rehearing in the Court below is reproduced herein in the Appendix (App. 67a.) An order of the Court below denied this petition for rehearing, Brown, Circuit Judge, dissenting, on August 21, 1956, without additional opinion. Such order is not reported. It is reproduced in the Appendix herein (App. 80a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. 66a) was entered June 30, 1956. Petitioners filed a timely petition for rehearing which was denied by the Court, Brown, Circuit Judge, dissenting, on August 21, 1956 (App. 80a).

Jurisdiction is conferred upon this Court by 62 Stat. Section 928, 28 U.S.C. Section 1254 (1), and Section 19(b) of the Natural Gas Act, 52 Stat. 831; 15 U.S.C. Section 717r (b).

QUESTION PRESENTED

The single question here presented is whether orders of respondent Federal Power Commission which effectively prevented petitioners from enforcing their rights under contracts for the sale and delivery of natural gas to Transcontinental Gas Pipeline Company—and which prevented petitioners finally and without recourse from collecting the contract price for such natural gas for the suspension period of 90 days from and after November 1, 1954, the effective date of petitioners contracts with Transcontinental—are reviewable under section 19(b) of the Natural Gas Act. The orders in question are respondent's orders Nos. 174-A and 174-B, as supplemented and applied to these petitioners by name in respondent's suspension orders dated October 29, 1954.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment No. 5 to the Constitution of the United States providing that "no person * * * shall be deprived of property without due process of law" is here involved.

STATUTES INVOLVED

Pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. Section 717 *et seq.* are printed in the Appendix, infra, pages 80a to 87a. These are Sections 1(b), 4(a), 4(c), 4(d), 4(e), 5(a), 7(a), 7(b), 7(c), 19(b) and 21.

Pertinent provisions of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Section 1009, *et seq.* are printed in the Appendix, infra, page 87a. These are Sections 10(a) and 10(b) thereof.

REGULATIONS INVOLVED

Respondent's Order No. 174-A constituting an amendment to its existing regulations was adopted July 30, 1954 and issued by respondent August 6, 1954 with Commissioner Digby's dissenting opinion. It was published in the Federal Register on August 12, 1954, 19 F.R. 5081. The provisions of this order are lengthy and the text thereof and that of Commissioner Digby's dissent thereto is set forth in the Appendix, infra, pages 87a to 103a.

Respondent's Order No. 174-B constituting an amendment to its existing regulations and an amendment to Order No. 174-A was adopted December 17, 1954 and issued by respondent December 17, 1954 with concurring opinion by Commissioners Smith and Stueck and dissenting opinion by Commissioner Digby. It was published in the Federal Register on December 23, 1954, 19 F.R. 8807. The provisions of this order are lengthy and the text thereof and those of the concurring and dissenting opinions are set forth in the Appendix, infra, pages 104a to 127a.

The suspension orders issued October 29, 1954 are set forth in the Appendix, infra, pages 128a to 132a.

The suspension orders issued December 7, 1954 are reproduced in the Appendix, infra, pages 132a to 136a.

REASONS FOR GRANTING THE WRIT

1. All of respondent's actions complained of by petitioners herein and in the Court below were predicated upon its erroneous interpretation of the decision of this Honorable Court in *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 672, and the duties erroneously assumed by it to be imposed upon it by such

decision. This is the first case to reach this Honorable Court wherein the impact of that decision upon the business of producers and gatherers of natural gas who sell the product to interstate pipeline transporters thereof under contracts executed prior to the date of that decision, June 7, 1954, and the impact of the respondent's orders Nos. 174-A and 174-B, issued upon an erroneous interpretation of the effect of that decision, upon the petitioners' businesses of production and gathering of natural gas and the sale thereof to interstate pipeline transporters thereof is in issue. Accordingly, special and most important reasons exist for the granting of the writ prayed for herein involving the true and proper construction of a decision of this Honorable Court, grave questions of the constitutionality of the respondent's orders complained of herein and important questions arising under the administration of the Natural Gas Act.

2. The majority opinion in the Court below is in direct conflict with the decision of another United States Circuit Court of Appeals on the same matter. This conflict requires resolution by this Honorable Court. The majority opinion herein unequivocally held that the suspension orders issued against petitioners under Section 4(e) of the Natural Gas Act are not reviewable under Section 19(b) of the Natural Gas Act. The United States Court of Appeals for the Fourth Circuit, in an unanimous decision, held, in *Atlantic Seaboard Corporation, et al.* v. *Federal Power Commission, et al.*, 201 F. 2d 568, that suspension orders so issued by the Commission are reviewable under Section 19(b) of the Natural Gas Act. The majority opinion, in holding that the suspension orders issued herein are not reviewable is, further-

more, in conflict with the holdings in *Phillips Petroleum Company* v. *Federal Power Commission,* 227 F. 2d 470 (10th Cir.); *Isbrandtsen Co., Inc.* v. *United States, et al.,* 211 F. 2d 51 (D.C. Cir.), cert. denied, 347 U.S. 990; *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 201 F. 2d 334 (1st Cir.) and *G. J. Amshoff, et al.* v. *United States, et al.,* 228 F. 2d 261 (7th Cir.), cert. denied 351 U.S. 939.

3. The majority opinion of the Court below in holding that neither the suspension orders nor orders 174-A and 174-B are reviewable and in further holding that it had no jurisdiction to pass on the question whether these petitioners, by reason of their operations, are natural gas companies subject to the provisions of the Natural Gas Act and the above-mentioned orders, is in conflict with applicable recent decisions of this Honorable Court, particularly, *Columbia Broadcasting System* v. *United States,* 316 U.S. 407; *United States, et al.* v. *Storer Broadcasting Company,* 351 U.S. 192; *Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.,* 350 U.S. 1005, denying certiorari in *Phillips Petroleum Co.* v. *Federal Power Commission,* 227 F. (2d) 470 (10th Cir.); *Frozen Food Express* v. *United States, et al.,* 351 U.S. 40; and *United Gas Pipeline Company* v. *Mobile Gas Service Corporation, et al.,* 350 U.S. 332.

STATEMENT OF THE CASE

On February 3, 1955, petitioners filed in the Court below their petition under Section 19(b) of the Natural Gas Act to review and to set aside the suspension orders issued against them and Orders Nos. 174-A and 174-B and to have the Court declare that they are not subject to the provisions of the Natural Gas Act (Tr. pp. 1-28).

In 1948, petitioners who then were and now are engaged in the business of producing oil and natural gas in Louisiana and other states entered into a contract for the sale of natural gas produced in five fields in southern Louisiana to Transcontinental Gas Pipeline Corporation. This contract contained the usual provisions found in other natural gas purchase contracts respecting first party and third party favored nations clauses and a bona fide purchase offer clause. Its term was twenty years. (Tr. pp. 126-127) Deliveries of natural gas thereunder commenced in 1951. In 1952, Transcontinental became dissatisfied with the contract as other purchasers were entering the area offering higher prices and escalations in price would occur in the future under the third party favored nations clause in the existing contract which would prevent it from controlling the future cost of its natural gas purchases from petitioners under the contract. A dispute arose respecting the escalated price to be paid under the contract by reason of a purchase by Louisiana Natural Gas Company from another producer in the pricing area at a price in excess of that specified in the Transcontinental contract. The dispute was referred to arbitration which resulted in a settlement between petitioners and Transcontinental effective July 1, 1952 and to endure, for the benefit of Transcontinental and its distributor customers, until November 1, 1954, the date of escalations in other contracts in the pricing area. (Tr. p. 127) During the period of this interim agreement, the price remained fixed at 8.79¢ per MCF plus 1¢ per MCF tax reimbursement and the third party favored nations clause was held in abeyance. (Tr. p. 127) Thereafter, negotiations at arm's-length were conducted between the parties which resulted in the execution of the five contracts dated November 17,

1953 which completely renegotiated and superseded the 1948 contract as of November 1, 1954. They appear in the transcript of record in the Court below. (Tr. pp. 152-188; 202-237; 242-277; 313-349 and 356-394). Under these new and superseding contracts the price during the five year period following November 1, 1954 would be 16¢ per MCF before 1¢ per MCF tax reimbursement. Such base price would be increased by 1¢ per MCF at the end of each successive five year period following the effective date of the contract. (Tr. p. 128) In return for its agreement to pay the increased price, Transcontinental received the following, among other, considerations of inestimable value to it: (1) a four-year extension of the contract term. (2) elimination of the third party favored nations clause, (3) narrowing of the area of operation of the first party favored nations clause to exclude parishes in Louisiana east of the Mississippi River, thus opening to it a prolific source of supply of natural gas without affecting the prices in its other gas purchase contracts, (4) dedication by petitioners to the performance of the contracts of additional reserves of the magnitude of 383 billion cubic feet of natural gas, (5) maximum daily deliveries were vastly increased to 125,000 MCFs, (6) "swing" was increased, (7) the price was fixed during the entire contract term without necessity for renegotiation, (8) Transcontinental acquired an option to purchase all additional gas developed in any of the five fields during the life of the contract at the price provided therein, (9) without additional consideration petitioners dedicated on July 8, 1954 an additional 100 billion cubic feet of gas for performance of the new contracts at the request of Transcontinental (Tr. pp. 128-133). Transcontinental has continued to enjoy all of these considerations received while petitioners have been

deprived, without possibility of recoupment, of the only consideration received by them, the increase in price after November 1, 1954, for the period of suspension. (Tr. p. 136) Since February 1, 1955, they have received the increased price provided in the new and superseding contracts but under an undertaking to refund with interest at 6% per annum the difference between the amount so collected and any amount other than the new contract price subsequently determined by the respondent to be just and reasonable for the sales price of the gas after February 1, 1955 upon conclusion of the Section 4(e) proceeding instituted against petitioners. (Tr. p. 407).

Prior to June 7, 1954, respondent had consistently ruled that it had no jurisdiction over producers and gatherers of natural gas who sold their product to interstate pipeline transporters thereof. (*Columbian Fuel Corporation*, 2 *F.P.C.* 200; Regulation No. 163 reported in 17 F.R. 7385, and Regulation No. 144 reported in 13 F.R. 6371). On June 7, 1954, this Honorable Court rendered its decision in *Phillips Petroleum Co.* v. *Wisconsin, et al.*, 347 U.S. 672. Respondent, erroneously for the reasons hereinafter set forth under the argument portion hereof, thereafter issued its series 174 orders and the suspension orders complained of asserting jurisdiction over all of the petitioners' activities upon the asserted holding of such decision, abrogated the new and superseding contracts executed prior to said date, prevented performance thereof in accordance with their terms, deprived petitioners of their statutory right to make an initial filing of their rates not subject to suspension without hearing, assessed their rates retroactively, attempted to regulate their production and gathering activities expressly ex-

empted from respondent's jurisdiction by Section 1(b) of the Natural Gas Act and issued these orders without notice and hearing which constituted a taking of the property of petitioners without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (Tr. pp. 15-26)

On August 6, 1954, respondent, without prior notice or hearing, issued its Order No. 174-A with dissenting opinion thereto of Commissioner Digby (Tr. 28-51; App. pp. 87a to 103a).

Petitioners, on September 2, 1954, filed a timely petition for rehearing and reconsideration of said Order No. 174-A. (Tr. 51-74). In this verified petition, it was shown that petitioners, from their operations, were not natural gas companies within the true construction of the Act, and that the *Phillips* decision of this Honorable Court did not confer jurisdiction upon the Commission over all of the sales and activities of petitioners as asserted in the order. The grounds asserted for invalidity of the order were specified in detail respecting the application of the provisions of the order to the activities of petitioners. This petition was not denied until the respondent, again without notice or hearing, on December 17, 1954 issued its Order No. 174-B (Tr. 96; App. pp. 104a to 127a).

On September 8, 1954, respondent issued an order granting oral argument on the petitions for rehearing of Order No. 174-A but without opportunity to present evidence (Tr. pp. 108-113). On September 24, 1954, respondent issued an order extending to December 1, 1954 compliance with two sections of Order 174-A requiring the filing of initial rate schedules and applications for certificates of public convenience and neces-

sity (Tr. pp. 114-116). No extension of time was thereby accorded respecting Section 154.94 of said order defining "changes" in rates and which required filing of all of petitioners' old and new and superseding contracts with Transcontinental before October 1, 1954. Petitioners, under protest and with full reservation of all rights and to avoid the severe civil and criminal penalties provided by Section 21 of the Act, filed such contracts as required by the order No. 174-A on September 30, 1954 and also filed on said date, similarly under protest and to avoid the imposition of such penalties, their application for a certificate of public necessity and convenience expressly denying that they are natural gas companies subject to Commission jurisdiction and Order No. 174-A, and further denying that their sales to Transcontinental were so subject (Tr. pp. 117-118).

On October 29, 1954, without specifications in writing of its reasons for suspension as required by Section 4(e) of the Act and contrary to the only evidence before it upon which it could make legal findings (petition for rehearing filed September 2, 1954 not then denied), respondent issued its order against these petitioners by name suspending for five months beyond their effective dates of November 1, 1954 all of petitioners new and superseding contracts with Transcontinental (Tr. pp. 118-123).

On November 12, 1954, petitioners filed their petition for rehearing and vacation of the suspension orders. (Tr. pp. 124-140). Therein, they presented full and complete information respecting the new and superseding contracts, the reasonableness of the new price provided therein and the unreasonable and discriminatory effect of the suspension orders.

On November 12, 1954, Transcontinental filed with respondent its statement in support of the petition for rehearing and vacation of the suspension orders (Tr. pp. 141-145).

On December 7, 1954, respondent issued against petitioners by name its order denying the petition for rehearing and vacation of the suspension orders and modifying its suspension orders of October 29, 1954 only by reduction of the period of suspension from five months to three months from November 1, 1954 (Tr. pp. 146-150).

On December 17, 1954, respondent, again without notice or hearing, issued Order 174-B with separate concurring opinions of Commissioners Smith and Stueck and dissenting opinion of Commissioner Digby. (Tr. pp. 75-107; App. pp. 104a to 127a). By paragraph F thereof, it overruled petitioners' petition for rehearing and reconsideration of Order No. 174-A filed September 2, 1954 (Tr. p. 96; App. p. 120a).

On January 14, 1955 petitioners filed a motion to permit them on and after February 1, 1955 to receive their price provided in the new and superseding contracts, subject to undertaking (Tr. p. 309). This motion was granted by order issued February 7, 1955. This motion and order in no way affected the suspension orders.

On February 3, 1955 petitioners filed in the Court below a timely petition under Section 19(b) of the Natural Gas Act and Section 10 of the Administrative Procedure Act, to review and to set aside the suspension orders and Orders Nos. 174-A and 174-B and to declare that petitioners are not subject to the provisions of the Natural Gas Act (Tr. pp. 1-28).

On June 30, 1956, after argument in the Court below, the majority and minority opinions were delivered (App. pp. 1a to 44a). On August 21, 1956 the majority in the Court below overruled a petition for rehearing filed by petitioners within the time provided in the rules of the said Court. This petition for writ of certiorari to review the judgment in the Court below is filed within the time provided by law.

ARGUMENT

I. THE SUSPENSION ORDERS ARE REVIEWABLE

The majority opinion in the Court below erred in holding that it was without jurisdiction under Section 19(b) of the Natural Gas Act to review the suspension orders. It erroneously concluded in its opinions in the companion cases of *Humble Oil Company,* (App. pp. 44a to 51a) and *Magnolia* (App. pp. 51a to 66a) that jurisdiction under that Section of the Act was conferred only to review orders issued after hearing and considered these opinions applicable and controlling in our case.

There is no reference to nor requirements for a hearing contained in Section 19(b) of the Act as a condition for review by the Appellate Court. The requirement in the section for certification of the transcript of the record upon which the order complained of was entered was precisely met by the certification of the record by the respondent to the Court below, which certificated record is now deposited in this Honorable Court.

The majority opinion further erroneously denied reviewability upon the holding that the suspension orders were not final and definitive. In such holding, the majority opinion is in direct conflict with the unanimous decision of the United States Court of

Appeals for the Fourth Circuit in *Atlantic Seaboard Corporation, et al.* v. *Federal Power Commission, et al.*, 201 F. 2d 568. Its attempt to distinguish the facts there presented from those involving the suspensions here presented is without factual or legal basis. That case involved a petition under Section 19(b) of the Act to review an Order of the respondent suspending certain increased rate schedules. There, as here, the suspension order denied the petitioners the right to put into effect the increased rate schedules without possibility of recoupment of the losses sustained during the period of suspension (22 days in that case beyond the date when the Commission was legally authorized to suspend them) even if ultimately allowed the increase sought. There, as here, the Commission asserted that the Court was without jurisdiction to review the suspension order because it was not a final and definitive order. This contention was squarely overruled by the holding of the Court that the power of review under Section 19(b) of the Act is not limited to final orders, the section granting the power to review "an order" of the Commission upon the petition of a party aggrieved. The Court further expressly held that a suspension order issued by the respondent is not a merely preliminary or procedural order or one which does not finally determine the rights of the parties. Since losses sustained during the period of suspension can never be recouped by rates subsequently allowed and could never be an issue in the hearings subsequent to suspension, the order of suspension is sufficiently distinct from the general subject of the litigation and sufficiently final and definite, the Court held, to "justify us in exercising the power of review vested in us by the statute" (cases cited). Neither upon the facts nor upon applicable legal prin-

ciples may that case be distinguished from ours. This was recognized by Brown, Circuit Judge, in his minority opinion (App. p. 39a) when he wrote:

> "Precisely this problem—an illegal suspension order—was presented in Atlantic Seaboard Corporation v. Federal Power Commission, 4th Cir., 201 F. 2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state 'we think that case is clearly distinguishable from the case at bar'. And to it may now be added Phillips Petroleum Company v. Federal Power Commission, 10th Cir., 227 F. 2d 470. See also Isbrandtsen Co., Inc. v. United States, D.C. Cir., 211 F. 2d 51, cert. den. 347 U.S. 990; Algonquin Gas Transmission Co. v. Federal Power Commission, 1st Cir., 201 F. 2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow".

The dissenting Judge most eloquently demonstrated the reviewability of the suspension orders herein when he stated (App. pp. 37a to 39a)

> "But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) 'Order'. In my judgment, this ignores the significant absence of any modifying term such as 'final' in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commission has no

power to award reparations or to impose out of current rates an amount needed to make up for a past deficiency due to an improvident suspension.

"Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that 'facts' are needed to prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Administrator can not claim he lacked power to do what was done.

"Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has expired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably

> final. When one seeks a judicial review of an order assumed to be invalid because it forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes."

Moreover, the majority opinion conflicts with this Court's decision in *United States, et al.* v. *Storer Broadcasting Co.,* 351 U.S. 192. Notwithstanding the fact that there had been no "hearing" nor any "evidence" adduced before the Commission, as prescribed in the section under which review was sought, and notwithstanding the fact that the Commission order was required to be "final", unlike the provisions of Section 19(b) of the Natural Gas Act, this Honorable Court held that the order there involved was reviewable, pointing out that the regulations aggrieved the respondent and operated to control its business affairs. Petitioners herein are certainly aggrieved by the suspension orders directed against them and such orders surely operated to control their business affairs. We meet precisely the test of reviewability announced in *Storer, supra.*

The majority opinion is further in conflict with *Phillips Petroleum Company* v. *Federal Power Commission,* 10th Cir. 227 F. 2d 470, cert. denied, sub. nom. *Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.,* 350 U.S. 1005 (1956) in which the Court specifically overruled an objection to its jurisdiction over suspension orders under Section 19(b), based upon the contention that such orders were not entered

upon evidence after hearing. This direct conflict was highlighted in the dissent of Judge Brown, *supra.*

The majority opinion failed to follow the above recent controlling authorities requiring the reviewability of the suspension orders. Instead, it relied upon the dictum in *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, taken out of context, in a case involving only an order instituting an investigation which in no way affected the contract rights of the company investigated and which involved no losses during a period of suspension not recoverable thereafter even though the increase in rate sought should be granted. Upon that authority, it erroneously denied reviewability.

Persuasive analogous authority supporting reviewability of these suspension orders is found, as noted by Judge Brown, in his dissenting opinion, in *Isbrandtsen Co., Inc.* v. *United States, et al.,* 211 F. 2d 51 (D.C. Cir. 1954), cert. denied 347 U.S. 990 (1955). There only "final orders" were, under the statute, reviewable. The Board insisted that in declining to suspend rates, it took only interlocutory action of a discretionary nature which was not reviewable. The Court, however, held the order reviewable upon the ground that the action of the Board attached grave consequences to contractual and other business relations of Isbrandtsen causing real, immediate and incalculable harm.

The majority opinion in denying reviewability of the suspension orders is in further direct conflict with *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 201 F. 2d 334 (1st Cir. 1953), as noted by Judge Brown in his dissent.

Such opinion further conflicts with the principles of law announced in this Court's opinion in *Columbia Broadcasting System* v. *United States,* 316 U.S. 407. Here, the suspension orders issued against us had the direct and immediate effect of denying to us during the period of suspension the increased price provided in our new and superseding contracts with Transcontinental, requiring us to deliver increased quantities pursuant to the contract terms after November 1, 1954, and permitting Transcontinental to enjoy all of the valuable considerations it received in exchange for its agreement to pay the increased price and denying forever to us during such period the only consideration received by us. Under the doctrine of *Columbia Broadcasting, supra,* any order having these direct effects on contract rights is a final order subject to review.

The error in the majority's attempt to distinguish the *Columbia Broadcasting* case (companion opinion in *Magnolia Petroleum Co.,* No. 15320, (App. p. 51a, et seq.)) upon the ground that it arose under Section 402(a) of the Federal Communications Act, rather than being an appeal under the provisions of Section 402(b) of said Act is now apparent in the light of this Court's decision in *Storer, supra.* There, in a case arising under the appeal provisions of Section 402(b), similar to Section 19(b) of the Natural Gas Act, this Honorable Court placed strong reliance upon the *Columbia Broadcasting* case in upholding the appealability and reviewability of an order which operated to control the business affairs of Storer.

In his dissenting opinion, Judge Brown, (App. p. 12a et seq.) after analyzing *Columbia Broadcasting* stated that it was "plain" that he found, contrary to

the majority, that case to be ample basis for reviewability of all of the orders complained of herein where regulations of far reaching and devastating effect are couched in general terms and directed against no party in particular. The presence in the Act of substanial penalties for violation of the regulations brings our case within even pre-Columbia law, he conclusively showed. "Any lingering doubt must have evaporated with *Frozen Food Express* v. *United States.*" These regulations were surprisingly similar to those involved here, wrote Judge Brown. *Frozen Food Express,* 351 U.S. 40 (1956) held reviewable an order of the Interstate Commerce Commission listing commodities found not to be "agricultural" within the meaning of Section 203(b) (6) of that Act. In reversing a three-judge court holding of non-reviewability, this Court sustained reviewability upon the ground that the Commission's determination had an immediate and practical impact on carriers and shippers alike. Such determination was not, therefore, abstract, theoretical or academic. The order is the basis for arranging the business affairs of both carriers and shippers and civil and criminal penalties may be incurred for violation of its provisions. That order, in these particulars, is identical with our suspension orders and the other orders challenged herein. These suspension orders are mandatory, directed to us by name and afford the basis for the imposition of both civil and criminal penalties for disobedience thereof under Section 21 of the Natural Gas Act.

The facts in our case are completely distinguishable from those in the companion case of *Humble Oil,* No. 15704 (App. p. 44a *et seq.*) upon the decision in which of non-reviewability of the suspension orders therein

the majority in the Court below found our suspension orders to be non-reviewable. *Humble* involved a fixed, step-up escalation price in a continuing contract. Our case involves new and superseding contracts, under which many new and valuable considerations were given by petitioners for the increased price they were promised by Transcontinental and became effective by their terms on November 1, 1954. Thus, a different and distinct *status quo* from that previously existing was created and the entire transaction involved the giving of a new service for an initial rate. Contrary to the holding of this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation* and *Federal Power Commission,* 350 U.S. 332, the respondent asserted its right to suspend us under Section 4(e) of the Act. The suspension orders did not have, as asserted in the majority opinion, the effect of maintaining the *status quo*; instead they impinged directly and finally upon new contract rights which, under *Mobile,* are free from suspension or review under Section 4(e) of the Act.

These suspension orders, moreover, are reviewable, as well, under Section 10 of the Administrative Procedure Act. In *Air Line Dispatcher's Association* v. *National Mediation Board,* 189 F. 2d 685, cert. den. 342 U.S. 849, the purpose of this section is held to afford review unless the matter has been committed to agency discretion, a situation not here presented. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing and unmistakable.

The foregoing authorities reveal the many instances in which the majority decision herein holding the suspension orders non-reviewable is in conflict with the decisions of other United States Circuit Courts of Ap-

peal on the same matter and is further in conflict with applicable decisions of this Court. These constitute special and important reasons for the exercise of the Court's discretion in granting the writ of certiorari herein prayed.

II. RESPONDENT'S ORDERS 174-A AND 174-B ARE REVIEWABLE

The majority opinion in the Court below held orders Nos. 174-A and 174-B non-reviewable upon the ground that "petitioners' contentions herein are in essence identical to those urged in *Magnolia Petroleum Company* v. *Federal Power Commission, supra,* and what was there said in respect to the non-reviewability of those orders is equally applicable and controlling here" (App. p. 5a). In this the majority erred, as no suspension orders had been issued in *Magnolia* as that company had not complied with the provisions of orders Nos. 174-A and 174-B. It had, in fact, procured a stay in the Court below. The fact that suspension orders were issued in our case prevents review of the orders 174-A and 174-B in a vacuum as to us. Their impact upon us has occurred because of our compliance therewith and the injurious results thereof may be evaluated readily and precisely in their application to our businesses. Reviewability of the impact upon us of orders 174-A and 174-B, by reason of our compliance therewith, renders the decision of the majority in the Court below upon the facts presented in *Magnolia* neither equally applicable nor controlling in our facts. Moreover, since in Part I of the argument herein, we showed conclusively that the suspension orders issued against us are reviewable, orders Nos. 174-A and 174-B are also reviewable under the familiar principle of law that review of a final and definitive

order involves also a review of the prior orders leading up to it.

For the reasons asserted in Part I of the argument herein, we reiterate that the majority in the Court below erred in its holding in *Magnolia,* considered controlling in our case, that orders nos. 174-A and 174-B were not reviewable under Section 19(b) of the Natural Gas Act because there was no transcript of record upon which the order complained of is entered and because the orders are not of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case. A transcript of the record was before the Court below. Reliance by the Court below upon *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, for this construction of Section 19(b) was shown therein to be erroneous and in conflict with later decisions of this Court. Restriction of reviewability to orders entered after hearing upon evidence, as held by the majority in the Court below, would effectively prevent review of the important legal question here presented, impose upon persons subject thereto who conscientiously believe such orders to be illegal the obligation of testing their validity only upon becoming subject to both civil and criminal penalties and is, at least, unrealistic. No such restriction has been placed by this Court upon persons contesting the legality of orders of other administrative agencies in recent cases. Under such a restriction, there could never be a review if only legal questions were presented requiring no hearing upon evidence. This is such a case. The decision of this Court is urgently required respecting the correct interpretation of the review

provisions of Section 19(b) of the Natural Gas Act for the future guidance of persons subject to the Commission's jurisdiction and of the Commission, as well, in the future administration of the Act. Such decision is, moreover, required, we submit, by reason of the vigorous and learned dissenting opinion of Brown, Circuit Judge, in these cases. His approach to the problems presented, we believe, is correct in law and conforms to the holdings and legal philosophy of this Court in its recent decisions upon analogous cases arising upon orders issued by other administrative agencies of the government and the impacts thereof upon the businesses of persons affected thereby.

The majority opinion in *Magnolia,* held applicable to and controlling upon us, was further in error in its conclusion that Orders Nos. 174-A and 174-B are not definitive and were issued prior to the completion of the administrative process. It is erroneous in fact for the unassailable reasons set forth in the dissenting opinion under the heading "The Order Determines Who Is Subject To The Act" (App. p. 16a). These orders had a direct and immediate impact upon the contract rights of these petitioners, upon the conduct of their businesses and upon the value of their respective properties. The reviewability of orders of other administrative agencies having such effects under comparable statutory review provisions has been sustained in three recent decisions of this Court; i.e., *Columbia Broadcasting System* v. *United States,* 316 U.S. 407; *U. S., et al.* v. *Storer Broadcasting Company,* 351 U.S. 192; and *Frozen Food Express* v. *U. S., et al,* 351 U. S. 40. Of similar import is the decision of the United States Court of Appeals in *G. J. Amshoff, et al.* v. *U. S., et al.,* 228 F. 2d 261 (7th Cir. 1956), cert.

denied, 351 U.S. 939. There is greater need for review of these Orders than existed in *Columbia*. There, under a "minute" of the Commission, a station could test the legality of the regulations in a license hearing without being subject to any penalty or even the denial of a license if its contentions proved to be incorrect. Here, there are no provisions in the Orders permitting us or anyone else to test the legality of any provisions thereof without exposure to the severe civil and criminal penalties of Section 21 of the Act.

The dissenting opinion herein, under the caption "The Standard of Reviewability" (App. p. 12a, *et seq.*) carefully analyzed, with copious explanatory footnotes, these four cases as requiring reviewability of Orders Nos. 174-A and 174-B and provided the key to the majority's misreading of *Columbia* in its *Magnolia* opinion (App. p. 62a, *et seq.*) The majority has, therefore, decided the question of reviewability of administrative orders in federal appellate courts under a federal statute in a way in conflict with applicable decisions of this Court. For this additional reason, the Court should exercise its discretion in favor of the issuance of the writ hereby sought.

The majority opinion further, in *Magnolia,* relied for its construction of Section 19(b) of the Natural Gas Act upon *United Gas Pipeline Co.* v. *Federal Power Commission,* 181 F. 2d 796 (D.C. Cir. 1950) cert. den. 340 U.S. 827. That case is clearly distinguishable from this case as the regulations there involved, unlike those in the case at bar, were exclusively prospective in application and the Court had the Commission's binding assurance that the regulations would only operate prospectively.

It is the direct and immediate impact of these Orders upon our contract rights, not contingent upon any future administrative action, which makes these orders definitive and final under Section 19(b) of the Act. They are wholly unlike orders which merely institute an investigation such as those involved in *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, also relied upon by the majority in *Magnolia* for its conclusion of non-reviewability of these orders under that section. Accordingly, these orders are not so preliminary or procedural as to escape reviewability. See also, *Isbrandtsen Co., Inc.* v. *United States, et al.,* 211 F. 2d 51 (D.C. Cir.), cert. den. 347 U.S. 990, more fully discussed in Part I hereof. They are much more than a mere determination of status. They control directly and without more our contract relationships with our customers. They constitute a definitive determination of the legality of numerous provisions of our contracts, such as among others, those providing for price increases, favored nations clause treatment and contract termination. Even apart from the suspension orders, these orders themselves wholly prevented our new and superseding contracts from becoming effective on November 1, 1954 pursuant to their terms. By performing thereafter pursuant to these contract terms we would, without more, have incurred the civil and criminal penalties provided in the Act.

These orders further command the filing of rate schedules retroactively as of June 7, 1954 under penalties and compel us to alter our whole business concept. The impact of the regulation brings about the necessity for filing of the rate schedules. There is no way of testing the validity of the order. It would be futile in this case, as shown in the dissenting opin-

ion under the heading "The Order Requires Filing of Rate Schedules" (App. p. 19a), to require later or more subsequent proceedings to satisfy the requirement of exhaustion of the administrative process. Equally compelling, he asserts, is the imperative command respecting the filing of changes in rate schedules (App. p. 22a). No status determination is needed here. The definition of independent producer and a sale which makes him one under that definition in the order sufficies and from that moment on the regulation is self executing. The immediate effect is to circumscribe the nature and extent of our businesses and future agreements as well. We are surely parties aggrieved by these orders within the meaning of the review section of the Act. See: *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470; *American President Lines* v. *Federal Maritime Board,* 112 F. Supp. 346 (D.D.C.); *National Coal Association* v. *Federal Power Commission,* 191 F. 2d 462 (D.C. Cir.).

The impact of these orders applies specifically to and affects and determines our rights and the Commission's actions in promulgating them is reviewable though they are not directed in terms to any particular person or corporation. This was the holding in *Philadelphia Company* v. *Securities and Exchange Commission,* 164 F. 2d 889 (D.C. Cir.), cert. den. 333 U.S. 828. They are, therefore, clearly not valid exercises of the quasi-judicial rule making power, as held by the majority opinion, but are adjudications requiring notice and hearing prior to promulgation of these regulations. They look to the past as well as the future. See: *American Sumatra Tobacco Co.* v. *S.E.C.,* 93 F. 2d 247 (D.C. Cir.); *Saxton Coal Mining Co.* v. *National*

Bituminous Coal Commission, 96 F. 2d 517 (D.C. Cir.); *United Gas Pipe Line Co.* v. *Federal Power Commission,* 203 F. 2d 78 (5th Cir.).

These orders, in addition, deprived us illegally of our statutory right to make an initial filing of our new contract price not subject to suspension under Section 4(e) of the Act but reviewable, if at all, only under Section 5(a) thereof. The companies, not the Commission, set the rates. Section 4(d) of the Act applies only to new schedules modifying previously filed and effective schedules. *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332. That is not the case here presented. Section 4(e) is not self-executing. Its requirements do not become effective until and unless a "time" and "form" of filing has been designated. This the respondent did not do until it issued the orders herein attacked. Implementing rules and regulations can only operate *in futuro.* Otherwise, they become adjudications and such adjudicative orders cannot deprive petitioners of their vested contract rights without notice and hearing, neither of which was here afforded. See: *National Labor Relations Board* v. *Guy F. Atkinson Co.,* 195 F. 2d 141 (9th Cir.).

These orders, moreover, illegally assessed our rates retroactively. See: *Hope Natural Gas Company* v. *Federal Power Commission,* 196 F. 2d 803 (4th Cir.); *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591; dissent of Commissioner Digby to order 174-A (App. p. 99a). They thus constituted a taking of our property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. See: *Philadelphia Company* v. *Securi-*

ties and Exchange Commission, 175 F. 2d 808 (D.C. Cir.); *Morgan* v. *United States,* 304 U.S. 1.

An additional reason for review of these orders is the new and revolutionary policy declared therein which has substantive consequences of great importance. This was the characterization of Judge Brown in his dissenting opinion under the title "The Order Prohibits Automatic Contract Escalations" (App. p. 23a, *et seq.*). He pointed out that the orders, in connection with the requirements concerning the filing of rate schedules and changes in rate schedules, categorically state that contract escalations are a change of rate. This, he stated, has a substantial and immediate two-fold impact: first, from the procedural and technical point of view, it has the effect of making the escalated rate a "new" or initial filing under sections 4(d)(e) with the complex problems of burden of proof and interim suspensions; and, second, the inability of the parties as a matter of actuality to enjoy the complete, prompt and uninterrupted performance of the contracts made by them. Such revolutionary policy, he emphasized, contravenes the principles announced in the most recent decision of this Court construing the Natural Gas Act, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation,* 350 U.S. 332. He outlined the history of and necessity for such escalation provisions in gas purchase contracts. Respondent's orders had the immediate effect of destroying the binding character of the agreements between producers and pipeline purchasers of the gas. The increased price may ultimately be approved but only after someone has convinced the Commission or a court or both that what the parties

agreed to do was fair, just and reasonable. Parties are thereby subjected to real, damaging and pressing results, he asserted, constituting a real and present impact which is recognized by laymen and must be recognized by the Judiciary, as well. This business impact affects pre-existing contracts. The radical change of policy has, as well, weighty and pressing effect upon current business judgments and transactions. The case for review of gas producers is as appealing, he said, as that of truck owners and television station owners afforded the protection of reviewability of orders of general application which altered markedly their business activity or immediately encumbered, frustrated or handicapped their business plans as, in *Frozen Foods, supra,* and *Storer, supra.* He pointed out the dilemma now facing the producers of natural gas so long as these regulations stand. Until they are tested all business is unavoidably affected by them. Until the validity of the new and revolutionary policy therein declared is determined "a major industry must speculate. This is a serious and troublesome point of law which a Court must and may determine. These Order 174 cases and the Suspension cases present it adequately for in both the Order does have an immediate, far-reaching consequence" (App. p. 27a). No stronger or more cogent reasons could possibly be advanced to warrant this Court to exercise its discretion in favor of granting the writ sought by this petition.

Moreover, the dissenting Jurist noted, the impact of "this pervasive policy" against contract escalations cannot be avoided or lessened by self-help as the pipeline purchaser is forbidden in fact and practice to

pay more for its gas than approved contracts permit. A present customer under an existing contract cannot pay more even though it is in accordance with its agreement and it desires to do so (as Transcontinental desires in our case—Tr. p. 141) and the seller (Producer) can find no relief by a termination of the contract as provided in the terms thereof since Commission consent is demanded under the Orders for termination or abandonment (App. p. 28a, *et seq.*).

He then emphasized one of the stated grounds for this Court's exercise of its discretion to grant the writ of certiorari when he stated: "This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the administration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract rate increase, a 'change in the rate schedule'. If it is a 'new' rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable. On the other hand, if the automatic escalation increase is but a part of the entire total contract rate, the application of the automatic increase is not the promulgation of a *new* rate and the review of such rate would be by a hearing pursuant to Section 5(a)". (App. p. 28a).

He then declared that the suspension cases (of which this case is one) and the administrative experience of the Commission demonstrate that this is no idle, academic, theoretical difference but "It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's. The order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the 'new' rate, if the purchaser would pay it, would be another violation". (App. p. 30a).

Another recognized ground for granting the writ was noted in his opinion when he declared: "Substantial doubts exist concerning the validity of the regulation. The doubts arise *on its face* (emphasis ours). The danger and consequence, if invalid, is pressing and immediate. And *no further record proof or evidentiary facts* (emphasis supplied) is needed to make it ripe for judicial determination". (App. p. 31a.)

The dissenting judge then stressed additional grounds for reviewability of the respondent's orders Nos. 174-A and 174-B in his discussions under the captions. "The Order Requires Application For Certificate of Public Convenience and Necessity. The Order Forbids Abandonment—Termination of a Sales Contract Without Commission Approval" (App. p. 31a). The order, he stated, has a force transcending

the Act for, in the absence of regulation it is left to the individual producer to determine whether he is subject to the Act, whether his sales bring him within the Act or the decision of this Court in *Phillips* and, on termination or abandonment, whether the sale is a service rendered by jurisdictional facilities, with exposure to the possibility of enforcement proceedings or criminal prosecution should he or his lawyer guess wrong. However, with the regulation all this is removed because it peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing or the commencement of a new service without it and forbids termination, subjecting one failing to comply automatically to the penalties of $500.00 for each and every day during which noncompliance continues "and all that would be open to determination would be the validity of the regulation" (App. p. 32a). He then outlined the substantial and immediate injurious business consequences visited upon gas producers by these dual commands contained in the order (App. p. 33a), particularly the imposition upon it of the far-reaching responsibilities of a public utility, a status which courts are reluctant to impose unless the statutory command is clear. In his opinion, there was "at least, a *substantial question* (emphasis added) whether the Act justifies a regulation imposing a *status* on the mere sale of gas, even one within the orbit of the *Phillips* case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities. There is even greater doubt concerning the right to forbid or regulate abandonment of sales since the Act relates expressly to service by jurisdictional facilities." (App. p. 33a). He noted, moreover, that by operation of the order the

magic date of June 7, 1954 (date of decision of *Phillips* in this Court) is of critical importance. If valid, it orders a *roll-back* of rates to a prior date stating:

> "Imposing a retroactive rate which is beyond the general power of the Commission subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the *ripeness now* for *judicial review* (emphasis supplied). Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed." (App. p. 36a).

The foregoing unassailable reasons for immediate review of the respondent's orders Nos. 174-A and 174-B assigned by one of the learned and impartial circuit judges of the panel of three who heard this case in the court below should suffice, we respectfully submit, to warrant this Court in exercising its discretion in favor of granting the writ of certiorari hereby sought.

III. THE APPLICATION OF THE NATURAL GAS ACT AND RESPONDENT'S ORDERS NOS. 174-A and 174-B TO PETITIONERS' OPERATIONS IS REVIEWABLE

The majority opinion of the Court below erroneously refused to review the question of the application of the Natural Gas Act and respondent's orders Nos. 174-A and 174-B to the operations of the petitioners upon the erroneous ground that the Commission had not made any initial determination that these petitioners are subject to the Act. This holding ignored the proceedings in the Commission set forth in the tran-

script of the record in the Court below. The suspension order of October 29, 1954 encompassing all of these petitioners' sales to Transcontinental, in and of itself, constituted a determination that the sales made thereunder were subject to the Act (Tr. p. 118, *et seq.*). These petitioners duly requested rehearing and reconsideration of this suspension order upon this ground, *inter alia.* (Tr. p. 124, *et seq.*). Despite the factual showing in the verified petition that petitioners' operations exempted them from the Act and that they are not natural gas companies subject to the Act or the orders Nos. 174-A and 174-B, the Commission denied the petition for reconsideration when it issued, on December 7, 1954, its suspension order modifying its prior suspension order dated October 29, 1954. (Tr. p. 146, *et seq.*). Moreover, prior thereto the Commission had before it the verified petition for rehearing, filed by these petitioners, in respect to Order No. 174-A (Tr. p. 52, *et seq.*). Therein, the operations of petitioners were factually presented showing that, in their sales to Transcontinental, they were not subject to the Natural Gas Act but were only producers and gatherers expressly exempted by Section 1(b) of the Act from Commission jurisdiction. Therein, it was shown that the gas involved in such sales was produced and gathered by petitioners and transported by them only to a central point in each field within the same state of production, Louisiana, at which point it was further gathered by Transcontinental in its gathering lines within the field and transported by it in its gathering lines to points where Transcontinental mixed it with gas which it gathered from other producers in other fields. Thereafter, after treatment and readying of the gas so mixed, Transcontinental transported the gas to and injected it into its main transmission

line and further mixed it with gas from Texas, being transported therein, to the company's market areas beyond Louisiana (Tr. p. 52, *et seq.*). Despite this uncontradicted evidence before it, respondent determined that these operations of petitioners in law constituted them natural gas companies within the meaning of the Natural Gas Act and subjected them to the operation of its Orders Nos. 174-A and 174-B when it overruled this petition for rehearing in paragraph F of Order No. 174-B (Tr. p. 96). By reason of the issuance of Order No. 174-A and the failure of the Commission to rule upon petitioners' timely application for rehearing with respect thereto prior to October 1, 1954, the latest date set in said order for compliance therewith with civil and criminal penalties for noncompliance, petitioners under protest and with reservation of all rights and to avoid such penalties filed their applications for the issuance by the Commission of certificates of public convenience and necessity respecting these sales to Transcontinental (Tr. p. 117). Such application showed upon its face that it was filed pursuant to the mandate of Order No. 174-A. It was accepted by the Commission as such required compliance with said order by one determined by the Commission to be subject to said order and the Natural Gas Act; otherwise, it should have been rejected and filing denied. Thereafter, respondent issued such certificate under said order to the petitioners, similarly under their protest and with reservation of all rights. The foregoing conclusively demonstrates the error of the majority in the Court below in its holding that the respondent had not determined that petitioners are subject to the Act and the orders in question herein. This plain error requires, we submit, review of the holding by this Court.

The majority in Court below, for the incontrovertible reasons set forth in the dissenting opinion more fully discussed in Part II, *supra,* was further in error in its holding that, under the doctrine of exhaustion of administrative remedies, it could not pass upon the question in this Part presented until final outcome of administrative procedures (App. p. 6a). All facts necessary to a judicial determination of the legal question presented appeared of record in the transcript below. Subsequent administrative proceedings could in no way further enlighten the court upon the facts or question presented. It could and should have been decided as a question of law in the same manner as courts daily rule upon motions for summary judgments upon pleadings and supporting affidavits. The seriousness and importance of the question presented and the impact of the orders in question upon the present and future conduct of the business operations of these petitioners required immediate determination of the serious question presented by constitutional courts. "Neither orderly administration nor due regard to the separation of executive or judicial functions compels or suggests that review should be postponed" (App. p. 37a).

Petitioners sell their gas from producing wells in the manner set forth above. They have always contended that such sales are a direct and immediate part of production and are, therefore, within the full protection of Section 1(b) of the Act. The dissenting opinion characterized this contention as "urged with much basis", stating "nothing in the *Phillips* decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498

(App. p. 35a). The dissenting opinion then reasoned that if, without hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases, that is, the *right* to the gas, because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or the other purchaser. But the orders in question forbid this. (App. p. 36a).

Aircraft and Diesel Corporation v. *Hirsch,* 331 U.S. 752, cited in the majority opinion in the Court below, is readily distinguishable from the facts in the case at bar. There, the appellant subcontractor had an adequate remedy at law by suits upon its contracts against its customers in which every question of constitutionality raised in its suit in the district court for a declaratory judgment and for an injunction could be presented and determined in such court. We have no such other adequate remedy for determination of the question here presented. Even in that case this Court was careful to point out that the presence of constitutional questions coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention (331 U.S. 773). The record in our case, for the reasons asserted in the dissenting opinion, brings it squarely within that pronouncement of this Court.

Moreover, by issuing the orders and denying the petitions and issuing the certificate to petitioners de-

tailed above, respondent finally determined that petitioners' operation subjected them to the Natural Gas Act and made them natural gas companies within the meaning of the Act and, accordingly, made them subject to its orders Nos. 174-A and 174-B. This determination will not be re-examined by the Commission in any future proceeding. No valid reason, therefore, is presented for postponement of review of the important question here presented pending further administrative action under the doctrine of exhaustion of administrative remedies.

These orders, in addition, as recognized in the dissent, attempt to extend the Commission's jurisdiction over production and gathering of gas, expressly exempted from Commission jurisdiction by Section 1(b) of the Act, far beyond the jurisdiction of the Commission as defined by this Court in *Phillips*. Neither that nor any other decision of this Court has conferred jurisdiction upon the respondent over petitioners' activities of production and gathering. The provisions in the orders in question requiring certification and Commission approval to gather and produce gas or to abandon such activities are definite attempts by respondent to extend its jurisdiction over our exempted activities of production and gathering certainly not authorized by the *Phillips* decision. That it is clearly intended by such orders to invade the area of production and gathering reserved to the states is clear from the proviso in Section 157.28 of Order No. 174-B (App. p. 120a) that the existence of "valid conservation orders of a state agency relating to the production and gathering of natural gas" may be asserted as justification for a company's compliance therewith. Even in such case, by this order, the Commission re-

serves unto itself the determination whether the conservation order of a state agency relating to production and gathering of natural gas is valid or invalid. It is not every such order of such agency which may be asserted as a justification for compliance therewith but only such as the Commission determines to be valid. No doubt may, therefore, exist respecting the intention of the Commission by these orders to assert and to exercise jurisdiction over our production and gathering activities despite the clear exemption thereof contained in Section 1(b) of the Act.

Substantially the same issue as that here presented was before this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co., et al.,* 337 U.S. 498, cited and applied to our facts in Judge Brown's dissenting opinion. This Court there held that to recognize any power in the Commission to regulate the disposition of natural gas leaseholds even by a company conceded to be a natural gas company and as such subject to Commission jurisdiction would be contrary to the unambiguously expressed intention of Congress in Section 1(b) of the Act that production and gathering were to be left outside the Commission's jurisdiction and subject only to such regulations as the respective states might impose. This Court grounded that decision, as well, upon its prior decisions in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581 and *Interstate Natural Gas Company* v. *Federal Power Commission,* 331 U.S. 682. The operation by us of our gas leaseholds, within the language of *Panhandle, supra,* page 505, is "an essential part of production."

The effect of these orders upon us is to require exploration for and development of sufficient reserves

to meet the maximum daily increased requirements of Transcontinental or to acquire additional gas leases for satisfaction thereof and allocate our production for this purpose. This is so because these orders require us to continue to meet these increased daily requirements from and after November 1, 1954 in the precise quantities specified in the new and superseding contracts effective on said date, without diminution in the quantities delivered daily except pursuant to a *valid* conservation order issued by a state agency relating to the production and gathering of natural gas and prevent any abandonment after such date of such service without Commission approval. Should production, thereafter, at any time be insufficient to satisfy the daily requirements of all of our other gas purchasers, even for intrastate use in the state of production or field use for further development of reserves, these orders unequivocally demand that we allocate, from such production, a sufficient quantity to satisfy in full and without any diminution therein the maximum daily requirements of Transcontinental before diverting any of such production to any other gas purchaser. The foregoing demands of these orders upon us have been condemned by this Court in the 14th footnote to its opinion in *Panhandle, supra,* 337 U.S., at p. 509.

This Court has frequently affirmed the production and gathering exception of Section 1(b) of the Act as an exception to the primary grant of jurisdiction. See: *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581; *Interstate Natural Gas Company* v. *Federal Power Commission,* 331 U.S. 682. In the latter case, this Court held that even a sale of gas technically consummated in interstate commerce

may be so related to production and gathering or so closely connected with local incidents of that process as to render regulation by the Commission inconsistent with or a substantial interference with the exercise by the state of its regulatory functions. There is nothing in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, which is in any way inconsistent with the above holdings of this Court. That decision was related to the Commission's power to regulate rates of a company which conceded that it was a natural gas company. The production and gathering exemption in the Act was affirmed as the Court there found that these activities had ceased before the sale by *Phillips* at the tail-gate of its processing plant occurred. In our case, on the contrary, these orders Nos. 174-A and 174-B are directed to all of our production and gathering activities and even, as above noted, require us to produce natural gas. An order of the Commission requiring an admitted natural gas company to increase its interstate pipeline capacity and to deliver to its customers a maximum daily volume of gas in excess of its line's capacity was reversed in *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 204 F. 2d 675 (3rd Cir.) upon the ground that such an order would constitute effective regulation of the production and gathering of natural gas.

It is clear, therefore, in our opinion, that these orders which compel the production and gathering of natural gas by petitioners are invalid. The danger and consequences of these invalid orders is pressing and immediate. In the language of the dissent, "no further record proof or evidentiary facts is needed to make it ripe for judicial determination" (App. p. 31a), and "If it is not valid, it requires no record, no evidence to

determine it. These and many other specific impacts result from the order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts'' (App. p. 37a).

CONCLUSION

For the foregoing reasons, petitioners herein most respectfully assert that the suspension orders issued by respondent against them, respondent's orders Nos. 174-A and 174-B and the application of the Natural Gas Act and these orders of the Commission to petitioners' operations are all reviewable by this Honorable Court and should be so reviewed, such reasons constituting grounds, within the Rules of the Court, for the exercise of its discretion in favor of the granting of the writ herein sought to be issued. Accordingly, petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to review its judgment herein.

Respectfully submitted,

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Certificate of Service

I, George D. Horning, Jr., a member of the Bar of this Court and one of the attorneys for petitioner herein, Union Oil Company of California, do hereby certify that, pursuant to Rule 33 of the Court, on the 14th day of November, 1956, I served a copy of the foregoing and annexed Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix thereto upon the Solicitor General, Department of Justice, Washington 25, D. C.; upon Willard Gatchell, Esq., General Counsel, and V. Russell Gorman, Attorney for respondent Federal Power Commission, attorneys of record for said respondent who represented it in the Court below, at their post office address of 441 G Street, N. W., Washington 25, D. C., by depositing the same in the United States mail box with first class postage prepaid addressed to each of the above-named persons at his above post office address.

/s/ GEORGE D. HORNING, JR.

APPENDIX

APPENDIX

APPENDIX

Majority Opinion in the Court Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,461

UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission Sitting at Washington, D. C.

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: Petitioners are here seeking review of four orders of the Federal Power Commission under Section 19(b) of the Natural Gas Act and Section 10 of the Administrative Procedure Act. With respect to Commission Orders 174-A and 174-B, this case presents issues identical to those involved in No. 15,320, *Magnolia Petroleum Company* v. *Federal Power Commission,* No. 15,321—*The Ohio Oil Company* v. *Federal Power Commission,* No. 15,352—*The Superior Oil Company* v. *Federal Power Commission,* and No. 15,354—*Wesley West* v. *Federal Power Commission,* decided this day. With respect to the other two orders by which the Commission suspended rates and charges for gas sold under contracts which had theretofore been filed with the Commission, this is a companion case to *Humble Oil & Refining Company* v. *Federal Power Commission,* No. 15,704 also decided today.

As in the *Magnolia* case, petitioners herein were among the numerous producers who filed with the Commission applications for rehearing of Order 174-A. They, like the other applicants for rehearing, were granted oral argu-

ment before the full Commission and were given an opportunity to file briefs in support of their applications. Following the submission of briefs and oral arguments, the Commission by order issued September 24, 1954, amended Order 174-A in a respect immaterial to the petitioners here, and extended the time for compliance with the order from October 1 to December 1, 1954, but it took no further action at that time upon the numerous applications for rehearing. Thereafter, on December 17, 1954, the Commission issued Order 174-B in which it amended and restated Order 174-A, and denied all applications for rehearing respecting Order 174-A, including those filed by petitioners herein.

Meanwhile, pursuant to the regulations promulgated in Order 174-A, and on September 30, 1954, petitioners, under protest and with reservations of all rights, filed with the Commission their applications for certificates of public convenience and necessity and their respective contracts together with all supplements thereto reflecting rates and charges in effect on June 7, 1954, for the sale of their gas to Transcontinental Gas Pipeline Company. These contracts had been entered into in 1948, and they contained identical provisions covering the sale of petitioners' gas to Transcontinental for a term of twenty years. Under the terms of these contracts which included a so-called "third party favored nation" clause, Transcontinental on June 7, 1954, was paying to petitioners 8.79 cents per Mcf. before tax reimbursement. On November 17, 1953, as a result of negotiations, petitioners and Transcontinental had entered into new contracts and these new contracts by their terms superseded the 1948 contracts as of November 1, 1954. Under these new and superseding contracts it was provided among other things that the price to be paid Transcontinental during the five-year period following November 1, 1954, would be 16 cents per Mcf. before tax reimbursement, and that such base price would be increased by one cent per Mcf at the end of each successive five-year period following the effective date of the contract. Consequently,

the filings made by petitioners on September 30, 1954, included: (1) petitioners' 1948 contracts with Transcontinental reflecting rates in effect on June 7, 1954; (2) the new and superseding contracts executed in November, 1953, and to be effective on November 1, 1954; and (3) applications for certificates of public convenience and necessity covering petitioners' sales to Transcontinental. On October 29, 1954, which was three days prior to the effective date of the 1953 contract, the Commission issued two orders announcing that on a date to be fixed it would enter upon a hearing concerning the lawfulness of the proposed changes in rates to be charged on and after November 1, 1954. In the same orders the Commission suspended and deferred the use of rate schedules providing the increased prices for a period of five months beyond November 1, 1954.[1] Following the issuance of these orders petitioners filed applications for rehearing and reconsideration, and by separate orders issued on December 7, 1954, the Commission shortened the respective suspension period to three months beyond November 1, but in all other respects denied the applications for rehearing.

On February 3, 1955, petitioners filed this joint petition for review in which they seek to have Orders 174-A and 174-B, and the two suspension orders of October 29 set aside, vacated, and nullified. In their petition they requested that all of the orders be stayed pending final determination of the petition for review. In addition to the

[1] The reasons given by the Commission in each of the orders for suspending these rates were: "The increased rates and charges proposed in the aforesaid filings have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful." The Commission's findings were: "It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed changes, and that the above-designated supplements be suspended and the use thereof deferred as hereinafter ordered."

foregoing, petitioners also prayed that this Court on final hearing decree that petitioners be entitled to collect and receive the "new contract prices for all natural gas sold and delivered to their customers during the period of suspension thereof," and that upon final hearing this Court declare that the petitioners are not natural-gas companies within the meaning of the Natural Gas Act and that they are not subject to the jurisdiction of the Commission. Thereupon the Commission filed a motion to dismiss the petition for review and an opposition to the request for stay on the grounds that the orders sought to be reviewed are procedural and interlocutory and not subject to judicial review or stay under Section 19(b) of the Natural Gas Act, and that petitioners have not exhausted the administrative remedies available to them under the provisions of the said Act. Upon consideration of petitioners' request for stay and the Commission's opposition thereto, this Court on March 9, 1955, issued an order denying the stay.

In their petition for review, petitioners asserted thirty-one assignments of error, and these assignments petitioners in their brief have compressed into the following six points: (1) all of the orders of the Commission here involved are reviewable orders under Section 19(b) of the Act, because they constitute definitive adjudications of petitioners' rights and, without more, have prevented the performance of petitioners' contracts in accordance with their terms; (2) by issuing the orders under review, the Commission exceeded its jurisdiction by depriving petitioners of their statutory right to make an initial filing of their rates which would not be subject to suspension without hearing; (3) in issuing the orders under review, the Commission exceeded its jurisdiction by assessing petitioners' rates retroactively; (4) in issuing Orders Nos. 174-A and 174-B, the Commission exceeded its jurisdiction by attempting to regulate these petitioners' production and gathering activities, which were expressly exempt from such jurisdiction by Section 1(b) of the Act; (5) the issu-

ance of Orders 174-A and 174-B without notice and hearing was illegal and constituted a taking of petitioners' property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States; and (6) by issuing the orders under review the Commission exceeded its jurisdiction by attempting to regulate sales by these petitioners which were exempted therefrom under the "production" and "gathering" proviso of Section 1(b) of the Act.

Thus, and as in the cases to which we have referred *supra* wherein we have been asked to review orders of the Federal Power Commission, the self same questions presented here are the reviewability, and, if reviewable, the validity of the Commission's orders. With respect to Orders 174-A and 174-B, the petitioners' contentions herein are in essence identical to those urged in *Magnolia Petroleum Company* v. *Federal Power Commission, supra,* and what was there said in respect to the nonreviewability of those orders is equally applicable and controlling here. Similarly, what we said in *Humble Oil & Refining Company* v. *Federal Power Commission, supra,* as to the nonreviewability of the suspension orders there involved is dispositive of the question here presented with respect to the suspension orders of October 29, there being involved in both cases an identity of legal principles.

In their petition for review and over and beyond the questions presented in the *Magnolia* and *Humble Oil* cases, petitioners are here asking us to declare that they are not subject to the provisions of the Natural Gas Act. For answer we deem it sufficient to say that the Commission, the administrative agency to which Congress delegated the power and duty of administering the Act, is the body entrusted with the initial determination of that fact, and no such determination has been made by it. The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and

awaiting their final outcome before seeking judicial intervention. As was stated in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 767:

> "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own . . . To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision."

Thus, until there has been a proceeding before the Commission, a record adduced, and an order issued declaring that petitioners are natural-gas companies within the meaning of the Natural Gas Act, and therefore subject to the jurisdiction of the Commission, this Court has no jurisdiction to act.

In the light of what we have just said and for the reasons stated at length in the *Magnolia* and the *Humble Oil* cases, the petition for review must be dismissed for lack of jurisdiction.

Dismissed.

BROWN, Circuit Judge, dissenting.

A True Copy:
Teste:

(SEAL)

JOHN A. FEEHAN, JR.,
Clerk of the United States Court of Appeals for the Fifth Circuit.

Minority Opinion in the Court Below in Union Oil Company of California and Louisiana Land and Exploration Co. v. Federal Power Commission, No. 15461, and Companion Cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,320

MAGNOLIA PETROLEUM COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,321

THE OHIO OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,352

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,354

WESLEY WEST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,471

GULF OIL CORPORATION AND GULF REFINING COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,470

THE TEXAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,461

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,704

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,627

STANOLIND OIL & GAS COMPANY, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,678

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,799

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,928

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,832

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,749

ROY LEE, TRUSTEE FOR HASSIE HUNT TRUST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

[*Petitions for Review of Certain Orders of the Federal Power Commission Sitting at Washington, D. C.*]

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

It is with the greatest of deference that I feel myself under the overpowering compulsion of dissenting from my Brothers in these important and carefully considered cases. My differences are deep and fundamental and rest not at all upon a criticism of these opinions which, with articulate

craftsmanship, fairly and honestly set forth the principal facts and expound the contentions. It is my view that these decisions are too much the product of an excision under the artificial sterility of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission that these cases are not to be reviewed "in a vacuum"—a figure with which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas.

We have been thrice-told, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 86 L.Ed. 1563; *Frozen Food Express* v. *United States*, — U.S. —, — L.Ed. — [Nos. 158-161, October Term 1955, April 23, 1956]; *United States* v. *Storer Broadcasting Company*, — U.S. —, — L.Ed. — [No. 94, October Term 1955, May 21, 1956], that as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt.

It therefore seems remarkable to me that in thirty-six cases argued over a week's time presenting nearly every situation confronting the gas industry, the Court finds that not a single one is reviewable.[1] This is done, variously

[1] If our decisions and Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F.2d 461, stand, there is no review of these substantial questions in sight, for Federal Power Commission v. Union Producing Company, D.C.Cir., 230 F.2d 36;

stated, on the ground that none of these actions by the Commission is a definitive "Order" having requisite compulsory characteristics.

In my view that comes about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all of these cases in their major categories will demonstrate the practical decisive business consequences of these actions and, from the standpoint of the technical ripeness or sufficiency of a given case for present review, consideration of all will indicate clearly the existence of at least one case in which *each* significant point is adequately presented. In this analysis[2] and expo-

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Gulf Oil Corporation v. Federal Power Commission, D.C.Cir., 230 F.2d 40, foreclose the equity injunction. During the four days' argument of these cases, I vainly sought from anyone or all of the battery of advocates for the Commission, even a hypothetical situation in which *some* gas producer involved in *some* situation could have *some* significant review. Apparently some slight character of "review" is given to the State Tax Escalation Cases (note 2, infra), but in the setting of the approach of nonreviewability in the fundamental jurisdictional situations and the complete bypassing of those problems (though present) in this one group, it indicates to me that in fact no review is really recognized even there.

[2] For convenience I group and refer to the cases in these categories: I. Order No. 174 Cases: No. 15320, Magnolia Petroleum Company; No. 15321, The Ohio Oil Company; No. 15352, The Superior Oil Company; No. 15354, Wesley West; No. 15471, Gulf Oil Corporation, Gulf Refining Company; No. 15470, The Texas Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. II. Suspension Cases: No. 15704, Humble Oil & Refining Company; No. 15627, Stanolind Oil & Gas Company; No. 15678, Continental Oil Company; No. 15799, Hunt Oil Company; No. 15928, Hunt Oil Company; No. 15461, Union Oil Company of California, Louisiana Land and Ex-

sition, I approach each case from the standpoint of the basic question of reviewability and decline to find some way, either on the indicated merits or some procedural aspect, to deny review. When the Court is so overwhelmingly committed to a philosophy of nonreviewability that should be, and is, the point of our departure. As I adhere to this approach, comments or statements may frequently appear in which the merits of a particular contention are assayed. These are not to be understood as a variance from my method. They are put forward not to reflect either tentative, or final conclusions, a *pre* or partial judgment on them. They are put forward solely to put flesh on these bones, to show the vital impact of agency action and the existence of substantial, serious, frequently difficult questions.

THE STANDARD OF REVIEWABILITY

At the outset it is plain that, contrary to my Brothers, I find in *Columbia*[3] *Broadcasting System, Inc.* v. *United*

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ploration Company. III. Abandonment Cases: No. 15832, Shank, Trustee; No. 14749, Roy Lee, Trustee. IV. State Tax Escalation Cases: Nos. 15706 through 15721, Continental Oil Company.

This division is for convenient, orderly presentation, but the entire opinion applies to all of the cases without regard to topical or category subdivisons.

[3] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Columbia Broadcasting System, Inc. v. United States, supra, at 316 U. S. 425, 86 L.Ed. 1575. "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. • • • The regulations are not any the less reviewable because their promulgation did not operate of their force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract." *Id.* at 316 U.S. 417, 86 L.Ed. 1571. "Here the Commission exercised its rule-

States, supra, ample basis for reviewability where regulations thought to be of far-reaching and perhaps devastating effect are yet couched in general terms and directed against no party in particular. Indeed, the presence in the Natural Gas Act[4] of substantial penalties for violation of the regulations brings these cases within the pre-*Columbia* law.[5]

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making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it. * * * " *Id.* at 316 U.S. 420, 86 L.Ed. 1573.

Federal Communications Com. v. American Broadcasting Co., 347 U.S. 284, 98 L.Ed. 699, reviewed and enjoined similar general regulations applicable to all. See also, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L.Ed. 817.

[4] Section 21(b) (15 USCA 717t(b)): "Any person who wilfully and knowingly violates any rule, *regulation,* restriction, condition, or order made or imposed by the Commission under authority of this act, shall, *in addition to* any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500.00 for *each* and every *day* during which such offense occurs." [italics mine]

[5] Mr. Justice Frankfurter's dissent in *Columbia,* supra, 316 U.S. 429, 433, 434, 86 L.Ed. 1577, 1580, characterized the prior cases of reviewability, "In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency." His comment analyzing United States v. Berwind-White Coal Mining Co., 274 U.S. 564, 71 L.Ed. 1204, as well as the other cases, United States v. Baltimore & Ohio Railroad Co., 293 U.S. 454, 79 L.Ed. 587; American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 81 L.Ed. 142; Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 56 L. Ed. 729; Chicago, R.I. & P.R. Co. v. United States, 284 U.S. 80, 76 L.Ed. 177; Rochester Telephone Corp. v. United States, 307 U.S. 125, 83 L.Ed. 1147, involving specific penalties for

Any lingering doubts must have evaporated with *Frozen Food Express* v. *United States, supra.* These regulations were surprisingly similar to those involved here. It was an *Ex Parte* proceeding with the report, seventy-one pages in length, listing specific items determined by the Interstate Commerce Commission to be within the agricultural commodity exemption of Section 203(b)(6), 49 USCA 303(b)(6). Reversing a three-judge holding of nonreviewability on the rubric of *United States* v. *Los Angeles Railroad Co.,* 273 U.S. 299, 71 L.Ed. 651, the Court sustained reviewability since, "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * * Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'Order' of the Commission is in substance a 'declaratory' one * * * 5 USC 1004(d) which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. * * * "

And *Frozen Food* was followed shortly by Storer Broadcasting Company, *supra,* holding general regulations determining eligibility for TV station licenses were orders reviewable at the suit of one in that business prior to the

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violation of regulations, is significant: "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." *Id.* at 316 U.S. 334-336, 86 L.Ed. 1580, 1581.

denial of a specific license application for, the Court said, "The Rules now operate to control the business affairs of Storer. * * * Storer cannot cogently plan its present or future operations. * * * These are grievances presently restricting Storer's operations." The *Columbia*[6] doctrine

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[6] The key to the majority's misreading of *Columbia* is found, I think, in the preoccupation in the Magnolia opinion (No. 15320) with some supposed peculiar difference between a Section 402(a) (Title 47 USCA 402) Urgent Deficiencies Act, (October 22, 1913, 38 St.L. 208, 219, Chap. 32) and a Section 402(b) review which, for all practical purposes, is the same as Section 19(b) here. Significantly, Mr. Justice Frankfurter in his *Columbia* dissent completely ignored that point and in neither of the dissents in *Frozen Food Express* or *Storer* is it even mentioned as a valid basis for distinction. In *Storer,* of course, it was our precise situation—a statutory review by the Court of Appeals. In 402(a) and (b) and in 19(b), the requirement of an "Order" and the basis for reviewability is substantially the same. Scripps Howard Radio, Inc. v. Federal Communication Commission, 316 U.S. 4, 15, 16, 86 L.Ed. 1229, 1237, "It is urged that the orders reviewable under § 402(a) * * * are intrinsically different from those reviewable under § 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform * * * As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington * * *." See also, Philadelphia Co. v. S.E.C., D.C.Cir., 164 F.2d 889 at 897, cert. den. 333 U.S. 828, 92 L.Ed. 1114, subsequent proceedings, 175 F.2d 808, reversed as moot 337 U.S. 901, 93 L.Ed. 1715.

Amshoff v. United States, 7 Cir., 228 F.2d 261, cert. den. 24 L.W. 3309, May 21, 1956, under the Hobbs Act, 5 USCA 1031, likewise reviewed, over the Administrator's contention that no definitive order had been entered, a general regulation which had the effect (as does much of the 174 Orders here) of repudiating an old and adopting a new administrative substantive policy.

The majority's emphasis (Magnolia 15320) on the requirement for, "A transcript of the record upon which the order complained of was entered" and the usual situation of an order, "of a definitive character dealing with the merits of a proceeding before the

has an expansive vitality to require that Courts view these matters in the light of a living world.

I.

Order 174 Cases

A consideration of but a few parts of Orders 174 A or B will demonstrate, I think, that the action of the Commission has tremendous practical, direct business consequences on those who produce natural gas.

The Order Determines Who Is Subject to the Act

When it is recalled that the whole sweep of the 174 Orders is to outline action to be taken by those brought under the Act by the Phillips decision, the definition[7] of "Independent Producer" has a positive and practical effect on the industry. This is so because it is the imprimatur of the Commission itself on the Phillips decision and, more so, it is one of doubtful validity. The doubt arises because

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Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case, Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 • • • " cannot, by a bootstrap-lifting process, defeat reviewability. The absence of a hearing, the receipt of evidence, the making of findings which is the very basis of much of the attack cannot thus be turned into a deficiency making it unreviewable, National Coal Association v. Federal Power Com., D.C. Cir., 191 F.2d 462, 466; Saxton Coal Mining Co. v. National Bituminous Coal Comm., D.C.Cir., 96 F.2d 517; American Sumatra Tobacco Corp. v. S.E.C., D.C.Cir., 93 F.2d 236; Philadelphia Co. v. S.E.C., supra; see also, Columbia Oil and Gasoline Corp. v. S.E.C., 3 Cir., 134 F.2d 265, 267. And, of course, where validity of regulation presents question of law on the face of the orders or regulations a "record" of evidence is not needed, see discussion of cases under II, Suspension Cases, infra.

[7] § 154.91 " 'Independent producer' as that term is used in these Rules means any person as defined in the Natural Gas Act who is *engaged in the production or gathering of natural gas* and who transports natural gas in interstate commerce *or sells* natural gas *in interstate commerce for resale*, but who is not primarily engaged in the operation of an interstate pipeline." [Italics mine]

the definition comprehends all those engaged in the production or gathering of gas who sell it in interstate commerce for resale. By its terms no distinction is made between those who sell *before* and those who sell *after* the production and gathering is completed. The regulation therefore reflects the Administrator's interpretation[8] of an opinion which is, or may be, read much differently by others.

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[8] Original Order 174 in the prefatory portions stated: "The decision of the United States Supreme Court on June 7, 1954, in Phillips Petroleum Company v. Wisconsin et al (347 U.S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or make sales in interstate commerce for resale are 'natural gas companies' subject to all the requirements of the Natural Gas Act. * * *"

In the Commission's brief in No. 15471, Gulf Oil Corporation, pages 1 to 3: "* * * These orders [174] stem directly from the decision of the Supreme Court in Phillips Petroleum Co. v. Wisconsin * * * in which that court held that the Commission has jurisdiction over independent producers which engage 'in "the sale in interstate commerce of natural gas for resale," and that such a company' is a '"natural gas company" within the meaning of that term as defined in the Natural Gas Act' (p. 677). By these orders the Commission * * * promulgated general rules and regulations to be applicable to natural-gas companies which were also independent producers subject to Commission jurisdiction under the Act. * * * * * * the Supreme Court held in Phillips Petroleum Co. v. Wisconsin, * * * that sales in interstate commerce for resale by producers and gatherers to interstate pipeline companies do not come within the 'production or gathering' exemption, but that producers and gatherers making such sales also are 'natural-gas companies' under the Act, and the Commission has the authority to regulate such sales."

The Commission's brief in Magnolia No. 15320, page 4: "* * * the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, including such sales in the area of production and gathering * * *."

This "extreme" view of the Phillips decision was successfully pressed by the Commission in Federal Power Com. v. J. M. Huber, D.N.J., 133 Fed. Supp. 479 (now on appeal Third Circuit).

Whatever else the Court meant to say or do, it seems plain to me that the Court was being careful to point out that sales made during production or gathering were not within the scope of the decision:

> " * * * production and gathering in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur." 347 U.S. at 678, 98 L.Ed. at 1045.

Nothing in that opinion[9] impairs the authority of its prior holdings that Section 1(b) " * * * precludes the Commission from any control over the activity of producing or gathering natural gas", *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U.S. 581, 603, 89 L.Ed. 1206, 1223; that the Commission has no power " * * * to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern", *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U.S. 682, 690, 91 L.Ed. 1742, 1748; that the regulations of the Commission may not be " * * * inconsistent with the exercise by [the states] * * * of the powers over production and

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[9] In the Phillips case (347 U.S. at 678, 98 L.Ed. at 1045-1046), the court reaffirms the previous cases on Section 1(b): "In Federal Power Commission v. Panhandle Eastern Pipeline Co. 337 U.S. 498, * * * we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural gas company'. Similarly in Colorado Interstate Gas Co. v. Federal Power Com. 324 U.S. 581, 598 * * * we stated that '[t]ransportation and sale do not include production or gathering', and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. *Id.* 324 U.S. at 602, 603. See also, Federal Power Com. v. Hope Natural Gas Co. 320 U.S. 591, 612-615, 88 L.Ed. 333, 350-352 * * *; Peoples Natural Gas Co. v. Federal Power Com. 75 App. D.C. 235, 127 F.2d 153; cf. United States v. Public Utilities Com. 345 U.S. 295, 307-311, 97 L.Ed. 1020 * * *."

gathering of natural gas reserved to it by Congress in § 1(b) of the Act", Id. at 331 U.S. 691, 91 L.Ed. 1748.

It is because of the genuine and reasonable basis for difference in the interpretation of the Phillips opinion that the regulatory definition has such an impact. Until there was an administrative definition describing those persons who would come within the meaning of the Phillips decision, it would be a matter of individual interpretation. Even though it were ultimately determined by subsequent proceedings that such interpretation was the correct one, no one in the interim could have been subjected to penalties for the violation of a regulation (since none existed) and the continued reasonable doubt about the interpretation itself would prevent the severe penalties for a criminal violation under Section 21(a), 15 USCA 717t(a).

But with the definition by regulation, all of that is removed. All that is left now for the individual is the ultimate validity of that definition. By force of this definition, one who produces natural gas and sells it for resale in interstate commerce is conscious that he is then subject to the Act and must conform all of his activities to it and must take the specific action which other sections of the Order command. I shall show in subsequent detail what these are, but even without this, it is completely unrealistic to say that profound consequences are not imposed when the Order, at its outset, transmutes, for example, the owner of the working interest in a small gas well from a simple enterpreneur into a quasi public utility. Like the trucker who hauled grapefruit and seeks frozen chickens to eliminate a dead haul, cf. *Frozen Foods, supra,* this act of Government has changed his whole economic life.

The Order Requires Filing of Rate Schedules

In the face of the positive command for the filing of rate schedules[10] as of June 7, 1954, by all "Independent Pro-

[10] Order 174 A, Section 154.92, "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate

ducers", it is difficult for me to follow the majority's statement (Magnolia No. 15320), " * * * Order 174-A is not a formal determination of any right or obligation; is not self-executory, and it does not command these petitioners to do or refrain from doing anything. * * * "

Since the Order (§ 154.92) is directed to an "Independent Producer" who is, in turn, defined in § 154.91 to be those who make interstate sales while producing and gathering, this regulation is an immediate, positive, firm, absolute requirement for the filing of rate schedules. It is plain and unequivocal in its terms, and being a regulation, it subjects those who fail to comply to the severe penalties (note 4 *supra*) of "$500.00 for each and every day during which such offense occurs." Not only does it subject the producer to fines and penalties, but the filing of these contracts by its nature turns his business into one of public concern. What was the moment before Order 174 his business, now becomes the Commission's business. It may be that ultimately that is what the Phillips decision intended and the regulation will have a validity to achieve that end. But that does not remove the fact of the impact of this regulation upon this business man. It, and it alone, compels him under the pain of immediate penalties to alter his whole business concept.

And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing

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* * * sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, [subsequently changed to December 1, 1954] file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such * * * sale effective on June 7, 1954. * * * (b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate * * * sale * * * to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days * * * a rate schedule * * * ."

of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.[11]

Moreover, this specific provision of the Order illustrates well the futility of later, or more, or subsequent proceedings which the Commission insists are necessary to satisfy the requirement of exhaustion of the administrative process. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638; *Public Service Comm'n* v. *Wycoff*, 344 U.S. 237, 97 L.Ed. 291; *Canadian River Gas Co.* v. *Federal Power Commission*, 10 Cir., 110 F.2d 350, reh. den., 113 F.2d 1010, cert. den. 311 U.S. 693, 85 L.Ed. 449; *United Gas Pipe Line Co.* v. *Federal Power Commission*, D.C. Cir., 181 F.2d 786, cert. den. 340 U.S. 827, 95 L.Ed. 607. If a regulation is not valid either because it is too sweeping or, as claimed by some of these petitioners, it covers a person not within the Act, how is it to be tested? If the complaint is directed against a regulation compelling the filing of private papers, what more is needed to test that than the Order itself? What sort of administrative proceeding is reasonably needed if a citizen conscientiously thought that this provision of the Order was illegal?

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[11] Section 4(c) of the Act: "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such *time* * * * and in such *form* as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *." [Italics mine]

Whatever may be the juridical metaphysics, e.g., Douglas v. County of Pike, 101 U.S. 677, 25 L.Ed. 968; Norton v. Shelby County, 118 U.S. 425, 30 L.Ed. 178, of what the 1954 Phillips decision did to a 1938 Act, it is plain that the Commission never claimed that it had the right to or was regulating these independent producers, Columbian Fuel Corporation, 2 FPC 200; Fin-Ker Oil and Gas Production Co., 6 FPC 92; Chicago Corporation, 6 FPC 98; Phillips Petroleum Co., 10 FPC 246, and to suggest now that on the birth of *Phillips*, the general regulations covering interstate transmission pipeline companies applied automatically to these individual producers lacks genuine substance.

Must he surrender the very papers for public perusal which he contends are his own business? If he is hurt because he is threatened with the necessity of surrendering private documents, has it not become incurable if to test it, he must first comply?

The Order Requires Filing of Changes in Rate Schedules

Equally compelling, Section 154.94, is the imperative command that, "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate * * * sale of natural gas * * * by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the * * * Act and in accordance with this section."

No status determination is needed here. The definition is "Independent Producer" and a sale which makes him one under Section 154.91 is all that is needed. From that moment on the regulation by its own terms is self-executing to impose the mechanical obligation of preparing and filing all such changes. Not only does that impose an obligation subjecting the producer to a $500.00 daily fine for noncompliance, but this has an immediate effect in circumscribing the nature and extent of his business negotiations, transactions, and agreements which he may make, or desire to make, with present or prospective customers. Surely an Order which states that no change can be made unless it is first filed has real and far-reaching effects. The very imminence of such a regulation calls for the immediate reconstruction of one's business. In the fundamental concept of its nature, it has, in the twinkling of an eye, ceased to be private and now becomes clothed with a certain public interest, or at least a certain public control.[12]

[12] It should be borne in mind that questions of this type stated in emphatic terms are not to be taken as a conclusion that such

The Order Prohibits Automatic Contract Escalations

Here, without a doubt, the regulations promulgate a new and revolutionary policy having substantive consequences of great importance. For the Order, in connection with its requirements concerning the filing of rate schedules and changes in rate schedules, categorically states that contract escalations are a change of rate.[13] This has a substantial and immediate twofold impact: first, from a technical, procedural point of view, it has the effect of making the escalated rate a "new" or initial filing under Section 4(d)(e) with the complex problems of burden of proof and interim suspension flowing from that; and, second, the inability of the parties as a matter of actuality to enjoy the complete, prompt and uninterrupted performance of the agreements as made by them.

At the heart of both is the fact that, " * * * the Act, * * * evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed

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Governmental supervision is wrong or invalid, or that the regulation is. We are here concerned only with an analysis of the Court's theme that Order 174 has no effect upon, does not require action by, these petitioning gas producers.

[13] Section 154.94 (Order 174 A): "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule."

Substantially the same provision is contained in Section 154.94(c) of Order 174 B except that this Section has been made even more specifically applicable to price changes provided for in an "initial rate schedule." In addition, Order 174 B, Section 157.25, condemns, in advance, escalator clauses in producer contracts submitted in support of applications for Certificates which would, of course, affect interstate transmission pipeline companies, since long-term contracts for their essential gas reserves which have heretofore contained escalation clauses (see note 14 infra) could no longer contain them. This is thus a radical departure on a wide front from former substantive policies.

with the Commission, the Act expressly recognizes that rates * * * may be set by individual contracts * * * The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. * * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, — U.S. —, — L.Ed. — [No. 17 and 31, October Term 1955, February 27, 1956].

The petitions before us adequately show that these gas producers each have long-term contracts with various gas purchasers, interstate transmission pipeline companies in which, following the traditional usage of the industry with the full approval of regulatory agencies, provision is made for the automatic increase in the price of the gas under the stated conditions. The escalation provisions are the direct outgrowth of the necessities of the contract and of the pipeline purchaser. Those proposing an interstate transmission pipeline must have two principal things: one, financing in astronomical sums, and, two, certificates of public convenience and necessity from the Commission. Investment bankers and underwriters of these securities require long-term supply and outlet commitments to justify the economic forecasts of the promoter. And the regulatory agency which, by the Certificates both approves the construction of the line and the issuance of securities for its financing, demands a like showing to establish fitness, ability and capacity to serve.[14]

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[14] Reference here to the Suspension Cases, and particularly Stanolind (No. 15627) and Continental Oil Co. (No. 15678), involving as they do gas from the Woodlawn Field, Texas, removes this from the dreaded vacuum. The Federal Power Commission

The imperative requirement that the purchaser have a long-term contract makes it essential that, in the ordinary course of business judgment, the seller have some means of protecting himself against the unpredictable fluctuations or developments in the twenty-year period. These take the form normally of automatic step increases in price at stated times or intervals and "Favored Nations" clauses, single or general, to assure that the seller has the op-

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in the Mississippi River Fuel Corporation case (Docket G-1281, et al) in 1952 stated: "The most important matter presented for consideration in the instant Mississippi certificate proceedings concerns the adequacy of the gas supply showing made by Mississippi in support of its proposed system expansion. The importance of an adequate gas supply showing has been stressed by the Commission in certificate proceedings, since every certificate of public convenience and necessity under the Natural Gas Act must be based upon appropriate findings, among others, that the applicant for such certificate is 'able and willing properly to do the acts and to perform the service proposed.' 'An adequate gas supply', as the Commission stated in its Opinion No. 230 and Order of June 24, 1952, *In the Matter of Northern Natural Gas Company*, Docket No. G-1618 * * *, 'is the bedrock upon which such findings must be grounded.' 'A gas supply can be considered adequate,' as the Commission further stated in the *Northern* case, *supra*, 'only if the volume available is sufficient to meet the demand requirements for the service proposed, if such volume is assured over a sufficient period of years to justify the expenditures required for the construction of the proposed pipe-line project, and if that assurance of a continuing supply of natural gas meets the requirements of public convenience and necessity. Generally, a supply of natural gas should be assured for a period approximating fifteen to twenty years, dependent upon the particular facts involved, if the pipeline project is to be economically sound and in the public interest and if the natural-gas company is to be in position to meet its obligations to investors and provide dependable service to consumers.'" The Commission then recited that they had previously found Mississippi's supplies inadequate but allowed additional time to correct it. Acquisition of additional reserves is approved: "* * * At the 1952 hearings Mississippi showed that it had entered into additional gas purchase contracts, covering the purchase of gas in the * * * Woodlawn gas fields in Texas * * *. These

portunity of enjoying the general increase in the value of gas in the area, reflected by genuine, good faith transactions or tenders, and, invariably, for proportionate increases in production, severance, or similar state taxes.

The immediate effect of this Order is, therefore, to destroy the binding character of the agreement made between seller (producer) and purchaser (pipeline). The rate may ultimately be the same, but only after someone has convinced the Commission, or Court, or both that what the parties agreed to do was fair, just and reasonable.

The Commission seeks to avoid this impact by insisting that the contract "rate" preserved by *Mobile, supra,* is the one being charged at the particular time and that what is payable before or after is of no consequence. That may ultimately be the rule of law. But it is not the rule of business and to assert it by this Order subjects these parties to real and damaging and pressing results. It becomes all the more devastating when, as I shall later discuss, we consider the effect of the Order requiring that an Independant Producer file an application for a Certificate of Public Convenience and Necessity to institute a sale and secure approval before he may abandon it. For here, by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered an individual enterpriser under no Governmental restraint or regulation,

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contracts are for primary terms of 20 years and provide prices ranging between 10.88¢ and 12.46¢ per Mcf * * * at the beginning of their terms, and thereafter higher prices are specified. * * *"

Another Suspension Case, Union Oil (No. 15461), involves suspension of escalated rates under a long-term contract with Transcontinental Pipe Line Company resulting from a renegotiation of the contract long prior to June 7, 1954, made primarily to meet the objections of the Federal Power Commission in Dockets No. G-2367 and G-4185 (see opinions No. 279 and 280, December 1954, March 1955, respectively) to sufficiency of gas reserves. After restudy of the gas supply reserves showed them to be 16.6 to 17.9 years, Transcontinental's application for certificate to build and finance facilities costing approximately $40,000,000.00 to compete for the rich New York market area was approved.

is suddenly informed that the contract rates to be paid to him in the last half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well.

And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television station owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, *Frozen Foods, supra, Storer, supra,* I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid —it simply is that as long as it stands undetermined all business is unavoidably affected by it.

Until this regulation is tested and the validity of this policy is determined, a major industry must speculate. This is a serious and troublesome point of law which a Court must and may determine. These Order 174 Cases and

the Suspension Cases present it adequately for in both the Order does have an immediate, far-reaching consequence.

Nor can the impact of this pervasive policy against contract escalations be avoided or lessened by self-help,[15] since the customer (purchaser) of one of these producers is invariably an interstate pipeline transmission company and, being licensed under Certificates issued by the Commission, it is forbidden in fact and practice to pay more for its gas requirements than approved contracts permit. The present customer (purchaser) under an existing contract cannot pay more even though it is in accordance with its agreement and it desires to do so, and the seller (producer) can find no relief by a termination of the contract since, as we shall see, Commission consent is demanded under the Order for termination or abandonment.[16]

This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the ad-

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[15] It is doubtful that Government (Administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality. "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. * * *" Columbia Broadcasting System, supra, 316 U.S. at 418, 86 L.Ed. at 1571.

[16] This is what the producers sought to do in the Abandonment Cases (Lee, Trustee, 15749; Shank, Trustee, 15832), but which, for nearly two years, the Commission has thus far prohibited.

ministration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract rate increase, a "change in the rate schedule." If it is a "new" rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable.[17] On the other hand, if the automatic escalation increase is but a part of the entire total contract rate,[18] the application of the automatic increase is not the promulgation of a *new* rate, and the review[19] of such rate would be by a hearing pursuant to Section 5(a).

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[17] Section 4(e), "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, * * * pending such hearing * * * may suspend the operation of * * * such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, * * *"

[18] United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 86 L.Ed. 855, 862: "The Master and the courts below, however treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' Williston on Contracts, Rev. ed. § 863 and cases there cited."

[19] "The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract * * *. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to

The Suspension Cases before us and the administrative experience[20] of the Commission demonstrate that this is no idle, academic, theoretical difference. It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's.

The Order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of the regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the "new" rate, if the purchaser would pay it,

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be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * the further powers (1) to preserve the status quo * * * by suspending its operation * * * and (2) thereafter to make its order retroactive, by means of the refund procedure * * *." United Gas Co. v. Mobile Gas Corp., supra. [Italics by the Court]

[20] The Commission's letter report May 4, 1956, to Senator Gore revealed 191 cases involving annual increases (not including state tax increases) of $18,737,482.00 in which escalation rate increases have been suspended and hearing or decision is pending. Presumably, at least 5/12ths (5 months maximum suspension period) of this is an irretrievable loss to producers even though the Commission ultimately approves the increased rate. Apparently only 39 cases have been disposed of involving $3,218,297.00 annual increases, and the Examiner's reports and Commission decisions thereon submitted as typical examples of the Administrative problems indicate the complex matters which an applicant must face and perhaps shoulder in showing the proposed increase to be just and reasonable, e.g., is a fair price to be determined by the going price in the field? By invested capital, and if so, upon what basis, per well, or field, or unit? By a desired rate of return and if so, what percentage and upon what base?

would be another violation. Substantial doubts exist concerning the validity of the regulation. The doubt arises on its face. The danger and consequence, if invalid, is pressing and immediate. And no further record proof or evidentiary facts is needed to make it ripe for judicial determination.

The Order Requires Application for Certificate of Public Convenience and Necessity

The Order Forbids Abandonment-Termination of a Sales Contract without Commission Approval

The purpose of the Commission to bring all producers within the scope of its interpretation of the Phillips case (defined in Section 154.91) and to subject all such producers to the severe obligations of a public utility is manifest by Section 157 of the Order. Certificates of Public Convenience and Necessity[21] must be obtained for each service and the service may not be abandoned[22] without Commission approval.

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[21] Section 157.23(a): "Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission * * * shall * * * file with the Commission an application * * *. (b) No independent producer of natural gas shall, * * * engage in any new service with respect to the * * * interstate * * * sale of such natural gas for resale in interstate commerce * * * without approval of the Commission, evidenced by a certificate of public convenience and necessity * * *" The contents of the applications are carefully prescribed concerning exhibits, technical data required, etc.

[22] Order No. 174 A provided: Section 157.28 "No independent producer as defined in Section 154.91 of these rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained * * *."

In Order No. 174 B this was changed by substituting the words of Section 7(b) of the Act and adding the proviso: "*Provided,*

As in the case of other sections of the Order which I have discussed, the regulation has a force transcending the Act. In the absence of a regulation, it is left to the individual gas producer to determine whether he comes under the Act, is a natural gas company, whether the Act (Section 7(c)) is to cover sales, whether the sale is one bringing him within the Act or the Phillips decision and, on termination or abandonment, whether the sale is a service rendered by means of jurisdictional facilities. If he or his lawyer guess wrong, he is exposed to the possibility of enforcement proceedings (Section 20), or criminal prosecution (Section 21(a)) for "willfully and knowingly" doing an act "declared to be unlawful", or as one who "omits or fails" to do an act "required to be done."

But with the regulation, all this is removed. It peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing, or the commencement of a new, service without it and forbids termination. Failure to comply subjects the person automatically to the penalties of $500.00 for each and every day during which noncompliance continues (Section 21

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however, That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas."

The Abandonment Cases before us and other administrative action taken indicates that in the administrative application by the Commission there is no difference between 174 B and 174 A for sales are considered "service rendered by * * * such facilities" and abandonment of a sales contract by an "Independent Producer" is forbidden: see J. M. Huber Corp. and Northern Natural Gas Co. v. J. M. Huber Corp., Dockets No. G-4326 and G-4957, Federal Power Commission v. J. M. Huber Corp., D.C.N.J., 133 F. Supp. 479 (now pending Court of Appeals, Third Circuit, No. 11799, argued June 18, 1956); Skelly Oil Co. and Lone Star Gas Co. v. Skelly Oil Co., Dockets No. G-5380 and G-5260; Argo Oil Corp., et al, Dockets No. G-6810, G-6811, G-2591 and G-2950.

(b)). And all that would be open to determination would be the validity of the regulation.

It is just as obvious that these dual commands subject those in the gas business to substantial and immediate business consequences. As to existing contracts the seller (producer) is helpless in his effort to enforce the mutual obligations for automatic escalation rate increases. His purchaser may not pay him the agreed increase. He must file his application as an "initial" rate under Section 4 and suffer the risk of a suspension and the burden of establishing the reasonableness of the rates. His only relief of self-help—that is, termination—is denied him because he must obtain Commission consent here as well. Whether as to existing contracts or the making of new ones, a producer knows that this subjects him to the far-reaching responsibilities of a public utility—a status which courts are reluctant to impose because of the inevitable encroachment upon normal business freedom unless the statutory command is clear, *Munn* v. *People of the State of Illinois*, 94 U.S. 113, 24 L.Ed. 77; *Wolf Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 67 L.Ed. 1103. All persons dealing with a defined gas producer, whether banker, investor, processor, transporter, or purchaser, would of necessity have to trim negotiations and the final agreement to the pattern of public utility and its potential governmental regulation. Business men would know this instinctively. Judges, I think, should know as much.

And yet there is, at least, a substantial question whether the Act justifies a regulation imposing this *status* on the mere sale of gas, even one within the orbit of the Phillips case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities.[23]

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[23] The command to apply for a certificate is found in Section 7(c). Its opening sentence restricts it to the completion of pro-

There is even greater doubt concerning the right to forbid or regulate abandonment of sales since the Act[24] relates expressly to service by jurisdictional facilities. The Congressional purpose[25] to restrict the prohibition against abandonment to services rendered by jurisdictional fa-

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posed facilities: "No natural-gas company or person which *will be* a natural-gas company *upon completion* of any *proposed construction* or extension shall engage in the transportation or sale of natural gas * * *." (Italics mine) This was the amendment of February 7, 1942, Public Law No. 444, 77th Congress, Chapter 49, Second Session [H.R. 5249], 56 Stat. 83. In its original form the Act required a certificate only when a company was entering a "market in which natural gas is already being served by another natural-gas company * * *" As investors and promoters were unwilling to risk the building of a line unless the statutory condition were met, it resulted in invariable hearings to prove the negative. The amendment was sought by the Commission to require certificates in the case of all *construction*, see hearings on H.R. 5249, 77th Congress, page 15 et seq.

[24] Section 7(b), "No natural-gas company shall abandon all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities * * *." [Italics mine]

[25] The Act originated in H.R. 5423, 74th Congress, as amendments to the Public Utility Act of 1935 with a "facilities" provision identical with Section 7(b) (see hearings H.R. 5423, 74th Congress, 1st Session, pages 32, 44, § 305(b)); the next bill, H.R. 11662, 74th Congress, 2nd Session, contained no prohibition on abandonment and representatives of the State Commissioners proposed an amendment that, "No gas company * * * shall discontinue service * * *," but this was rejected and language of present § 7(b) was used. In the 75th Congress, 1st Session, on H.R. 4008, efforts by the New York Public Service Commission to obtain an amendment, "No natural gas company shall abandon service to any of its customers * * *" failed, and H.R. 6586, 75th Congress, 1st Session, which became the Act, contained the language now found in § 7(b). The Committee report, No. 709, 75th Congress, 1st Session, stated, "Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission * * *."

cilities seems quite plain and is, interestingly enough, apparently acknowledged by the Commission.[26] If, then, the proper construction of 7(b) is that it relates only to services rendered by jurisdictional facilities, the regulation would be invalid in prohibiting termination of sales contracts unless the given sale was accomplished through physical facilities owned or operated by that producer in the performance and rendition of the sale and such facilities were "subject to the jurisdiction of the Commission."

And finally, the petitioners urge with much basis, the *sale* of gas by a producer from a producing well is a direct and immediate part of production and is therefore within the full protection of Section 1(b). Nothing in the Phillips decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L.Ed. 1499.[27]

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[26] By letter, June 17, 1955, from Chairman Kuykendall, Federal Power Commission, to Chairman of the Senate Committee on Interstate and Foreign Commerce, amendment of Section 7(b) was proposed to make clear " * * * that the Commission is authorized to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers." See hearings, 84th Congress, 1st Session, on S.712 et al, pages 1234, 1235. No such bill was passed. Apparently the Commission has sought from Congress legislation designed to impose a general service obligation, see hearings, 80th Congress, H.R. 4051, pages 99, 100, 428-430, 461-462, and has sought to amend Section 7(b), see Annual Reports 1951 at page 145; 1952 page 152; 1953 page 155; 1954 page 170.

[27] The Commission's Order forbidding the transfer of leases was reversed: "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act * * * In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 89 L.Ed. 1206 * * *

If, without let or hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases—that is, the right to the gas—because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or to the other.

The present Order forbids this. It is ever-present in the shaping of gas transactions. And in the Abandonment Cases before us, it has kept particular gas producers from enjoying the fruits of and complying with the contracts made by the new purchasers with consequent substantial money losses.

The Order Compels Other Action

By operation of the Order, the magic date of June 7, 1954, is of critical importance. If it is valid, it orders a roll-back of rates to a prior date. Imposing a retroactive rate which is beyond the general power of the Commission

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we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of Congressional intent. Of course, leases are an essential part of production. * * * The Federal Power Commission leans heavily upon Section 7(b) * * *. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'" Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, at 337 U.S. 504-509, 93 L.Ed. 1504-1507. And see Colorado Interstate Gas Co. v. Federal Power Commission, supra, Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 91 L.Ed. 1742; Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L.Ed. 333, approved expressly in the Phillips decision.

subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed.

II.

Suspension Cases

In each of the Suspension Cases, the producer sought to collect the increased rate resulting from automatic contract escalation provisions. These rate increases were treated as "new" filings under Section 4 and were suspended for various periods of time. As thus presented each involves the question discussed at length concerning the nature of escalation increases and the Commission's power to forbid them. That is a serious question of law with substantial arguments on both sides. If what I have said is correct, then these petitioners in the Suspension Cases are certainly aggrieved and, as to them, the question is ripe for judicial review.

But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) "Order." In my judgment, this ignores the significant absence of any modifying term such as "final" in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commis-

sion has no power to award reparations or to impose out of current rates an amount needed to make up for a past deficiency due to an improvident suspension.[28]

Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that "facts" are needed to prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Administrator can not claim he lacked power to do what was done.

Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five

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[28] Federal Power Commission v. Hope Natural Gas Company, supra; State Corporation Commission of Kansas v. Federal Power Commission, 8th Cir., 215 F.2d 176; Hope Natural Gas Company v. Federal Power Commission, 4th Cir., 134 F.2d 287, 310, "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission * * * regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission * * * As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates."

months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has expired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably final. When one seeks a judicial review of an order assumed to be invalid because it forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes.

Precisely this problem—an illegal suspension order—was presented in *Atlantic Seaboard Corporation* v. *Federal Power Commission,*[29] 4th Cir., 201 F.2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state, "We think that case is clearly distinguishable from the case at bar." And to it may now be added *Phillips Petroleum Company* v. *Federal Power Commission,*[30] 10th Cir., 227 F.2d 470. See also, *Isbrandtsen Co.,*

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[29] To the familiar lament from the Commission, the Court stated at 201 F.2d 572: "We are not impressed with the argument that we are without jurisdiction in the premises * * *. The Commission argues that the order which we are asked to review is not a definitive or final order * * *; but our power to review is not limited to final orders. * * * The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definite to justify us in exercising the power of review vested in us by the statute."

[30] The same objection was made: "Reviewability is thus not strictly limited to final orders. * * * And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See Atlantic Seaboard Corp. v. Federal Power Com-

Inc. v. *United States,* D.C.Cir., 211 F.2d 51, cert. den. 347 U.S. 990, 98 L.Ed. 1124; *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 1st Cir., 201 F.2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow.[31]

Nor, in my view, does reviewability of the Suspension Cases depend finally on invalidity of the regulation forbidding automatic escalation. The parties raised other and substantial questions concerning the sufficiency of the administrative process. These include the repeated use of stereotyped suspension orders magnified in several instances by other stereotyped denials of rehearing and whether such rubber-stamped treatment met the demands

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mission, 4th Cir., 201 F.2d 568; * * *. The Orders sought to be reviewed here do not deal with the merits of the proceeding before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 * * * the legal consequences which attach to these orders have conclusive effect on the rights and duties of Phillips as an independent producer * * * and they are therefore reviewable." 227 F.2d at 474.

[31] See Amarillo-Borger Express v. United States, N.D. Tex., 138 F.Supp. 411, expressly approved and followed in Long Island Railroad Company v. United States, E.D.N.Y. [Civil Action 16321, May 9, 1956] .... F.Supp. ...., (statutory three-judge courts), in which an illegal revocation of a suspension order by the Interstate Commerce Commission was enjoined. The extensive materials dealt with under the Administrative Procedure Act raises considerable doubt in my mind that the Court's action here, in rejecting the Administrative Procedure Act, is correct. Of course, reviewability depends on the statutes and not what the parties say they invoke. See footnotes 2, 3 and 4, United States v. Storer Broadcasting Co., supra.

of the statute that the Commission, in suspending, shall deliver "to the natural gas company affected thereby a statement in writing of its reasons for such suspension", Section 4(e); *Amarillo-Borger Express* v. *United States, supra,* and *Long Island Railroad Company* v. *United States, supra.* And, as to at least two of them (Stanolind 15627 and Continental 15678), the action bordered upon complete administrative irresponsibility since for the very same contracts covering the very same gas out of the very same wells, the Commission found, in the stereotyped rubric, that the identical rate should be suspended as to one seller but not as to a co-seller. In this and the other respects the State Tax Escalation Cases likewise fit in this category.

III.

Abandonment Cases

In each of these cases, the producer (seller) had a right under the contemporary contracts to terminate the sale of gas. In one there was the right to obtain an increase in the price if bona fide offers were available from others. The current customer declined to meet the tendered increase, and the producer sought to exercise the contract right of termination and sell gas in the future to the new purchaser at the increased price. In the other, the producer sought to exercise his contract right to select his own purchaser and conclude a gas sales agreement with that new purchaser. By whatever label described, the letters and orders of the Commission have effectually prevented the producer from exercising the right to terminate, that is, abandon the sales contract. This is done pursuant to the indicated sections of Order No. 174. If, as the analysis indicates, there is substantial doubt that Section 7(b) covers sales when no jurisdictional *facilities* exist, that order is an illegal one depriving the petitioners of immediate, substantial benefits. If that order is illegal, it is so because of the limited nature of Section 7(b), and

no facts, no evidence, no record is needed or essential to an orderly presentment of that substantial and serious question.[32]

By virtue of Section 154.97 (cancellation of rate schedules) and Section 157.23(b), it was likewise necessary for these petitioners to file notice of termination of rate schedules and a request for the issuance of a new Certificate of Public Convenience and Necessity for sale of the gas to the new purchaser. If, on the analysis I have set out, these regulations are beyond the power of the Commission, it means that by their operation, the petitioners have been deprived of the immediate enjoyment of their private contract rights. That issue is present and has immediate consequences.

IV.

State Tax Escalation Cases

These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. The Court in arriving at a decision, presumably on the merits, completely bypasses this question. If, as my discussion indicates, that order may be invalid, then the Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954). (I do not decide this question since I think it too important to determine until we, as a Court, reach it for deliberative joint judgment.) Moreover, the Court's opinion in emphasizing the

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[32] On the review, if granted, there would be a substantial question whether the Commission had the right to "reject", as they did, one or more of these filings. Mississippi River Fuel Corp. v. Federal Power Commission, 3 Cir., 202 F.2d 899.

fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof. Finally, while the transmutations of the order and the change of dates from September 15, to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions. Conceding, for the moment, that there was intended significance in what appears to me to be inadvertent scrivener errors made under circumstances of understandable and almost hysterical pressure, I would have considerable doubt that a Commission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity. Finally, since the Court does reach some of the merits here, I can find in the record no basis for assuming that the sales involved in these contracts were within the jurisdiction of the Commission. Such findings and evidence is necessary. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 L. Ed. 626; *Stark* v. *Wickard*, 321 U.S. 288, 80 L.Ed. 733; see also, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 512, 92 L.Ed. 128, 135.

I have written at such length as my views in all cases because I think these many troublesome legal questions are begging for a Judge's answer. What the answers will be, I do not know. But the Commission by its 174 Orders and action in the individual cases has presented cases ready and ripe for adjudication.

We shut ourselves off from life if we think that that which has had the gas business in such turbulence has, as yet, no effect or impact.

I therefore respectfully dissent.

(SEAL) A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit.

Majority Opinion in the Court Below in Companion Case of Humble Oil and Refining Co. v. Federal Power Commission, No. 15704

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,704

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of an Order of the Federal Power Commission, Sitting at Washington, D. C.

(June 30, 1956)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This is one of six cases which presents a common question of law concerning the validity or orders of the Federal Power Commission suspending changes in rates for sales of natural gas by the respective petitioners.

Petitioner herein has invoked the jurisdiction of this Court under Section 19(b) of the Natural Gas Act to re-

view an order of the Federal Power Commission issued on May 19, 1955, by which the Commission suspended for a period of five months a rate filed by petitioner covering certain of its sales of natural gas to United Gas Pipe Line Company.

The facts to the extent that they need be stated are these: By a contract dated February 9, 1954, petitioner agreed to sell natural gas to United for a term of nineteen years from the date of the initial delivery of gas thereunder, and deliveries commenced on June 1, 1954, which was six days prior to the date on which the Supreme Court handed down its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672. As we set forth at length in *Magnolia Petroleum Company* v. *Federal Power Commission*, No. 15,320, this day decided, the Commission thereafter issued its series of 174-Orders in which it promulgated rules and regulations providing for the filing of rate schedules by "independent producers"[1] of natural gas subject to the jurisdiction of the Commission in which schedules were to be set forth the terms and conditions of service and all rates and charges effective on and after June 7, 1954, for the transportation and sale of natural gas in interstate commerce. "Rate schedule" was defined in the regulations to mean "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 . . ." And in respect to periodic increases contained in such basic contracts the regulations provided that: "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the

[1] The term "independent producer" was defined in the regulations, 18 C.F.R. § 154.91, as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule." These regulations further provided that, with certain exceptions not here material, no change could be made in any such rate schedule without first filing a notice of change in rates not less than thirty nor more than ninety days prior to the effective date thereof pursuant to Section 4(d) of the Natural Gas Act.

On September 24, 1954, petitioner filed under protest and with jurisdictional reservations the aforementioned contract of February 9, 1954, as amended, covering its sales of natural gas to United, which when filed was assigned a number and designated a "Rate Schedule" by the Commission. Under the terms of this contract, and to the extent here pertinent, the prices to be paid for all gas to be delivered to United during the life of the contract were stipulated to be as follows: during the one year period commencing on the date of first deliveries of gas thereunder (June 1, 1954 to June 1, 1955), 12.35 cents per Mcf., and during the period commencing on the expiration of the first one-year period and extending until November 1, 1955, 13.35 cents per Mcf. The contract also provided that 1.15 cents were to be added to each of the above-stated prices to cover a tax reimbursement of one cent per Mcf., and a service charge of .15 cents per Mcf. On April 21, 1955, in compliance with the regulations provided in the 174-Orders, but under like protest, petitioner filed with the Commission a notice to the effect that under and pursuant to the terms of its contract with United, the applicable price to be paid for gas delivered thereunder, effective June 1, 1955, would be 14.5 cents per Mcf. By an order issued May 19, 1955, the Commission ordered that a public hearing be held upon a date to be fixed by the Commission, and suspended the proposed changes in rates and charges "until November 1, 1955, and until such further time as it is made effective in the manner prescribed by the Natural Gas Act." The reasons for its action were stated by the Commission as follows.

"The increased rates and charges proposed in the aforesaid filings have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful." And its findings were that: "It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed changes, and that the above-designated supplement be suspended and the use thereof deferred as hereinafter ordered." Following the issuance of the order of May 19, petitioner applied to the Commission for a rehearing thereof in which it sought to have the Commission "affirmatively recognize the validity and effectiveness of all components of the rate set forth in Humble's contract with United dated February 9, 1955 . . . including particularly the price thereby made effective on and after June 1, 1955, and that the Commission forthwith abrogate without hearing . . . or after such hearing . . . said order issued May 19, 1955." The Commission, being of opinion that the grounds for rehearing alleged in the application did not present any question of fact or law not fully considered by it prior to the issuance of its May 19 order, and therefore did not warrant a rehearing, denied the application for rehearing by and order issued on June 20, 1955.

Following the denial of its application for rehearing, petitioner filed this petition for review together with a motion for stay pending review by this Court, urging in both pleadings that it is aggrieved and is suffering irreparable injury by reason of the fact that the revenues lost by it, alleged to be a net loss of $22,500 per month, cannot be recouped. In its petition for review, it claims that the order is invalid for numerous reasons, the most important of which are substantially as follows: (1) that the prices involved were contract prices and as such constituted the "initial" rate filed by petitioner which is not subject to suspension under Section 4 of the Natural Gas Act; (2) that the order does not contain "a statement

in writing of the reasons for such suspension" as is required by Section 4(e) of the Act; (3) that the order is arbitrary, capricious, and unduly discriminatory, contrary to the provisions of the Natural Gas Act and to the Commission's announced rate policy; and (4) that the action of the Commission abrogates petitioner's contract and constitutes a confiscation of its property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States. The Commission, in turn, filed a motion to dismiss the petition for review and to deny the motion for stay on the grounds that this Court has no jurisdiction under Section 19(b) of the Act to review or to stay the order because it is not a definitive order entered after hearing and completion of the administrative process, and that in any event petitioner has failed to show legally cognizable irreparable injury or that the equities justify the issuance of a stay. Upon consideration of petitioner's motion for stay and the Commission's opposition thereto, this Court on August 25, 1955, issued an order denying the stay.

The questions presented by the petition and the motion to dismiss include the reviewability and, if reviewable, the validity of the Commission's order. The question of reviewability necessarily involves a determination of whether we have jurisdiction to review such order under Section 19(b) of the Natural Gas Act. In *Magnolia Petroleum Company* v. *Federal Power Commission, supra,* we observed that this statutory review provision of the Act contemplates a review by this Court of definitive orders entered after hearing and upon completion of the administrative process, and what we said there with regard to the conditions necessary for our review of the Commission's action is controlling here.

Applying this test of reviewability, we have here a situation where the Commission, exercising its regulatory jurisdiction and acting under one of the sections of the Act which do not require a hearing, has consistent therewith entered an order without a hearing first had. Ap-

plicable Section 4(e), in pertinent part, provides: "Whenever any such new schedule is filed the Commission shall have authority . . . *to enter upon a hearing* concerning the lawfulness of such rate, charge, classification, or service; and, *pending such hearing and decision thereon*, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect . . ." Moreover, the order in question is in no proper sense a definitive order. It is a mere procedural step taken at the inception of and not upon the completion of the administrative process. A realistic appraisal of the order and the function it performs demonstrates that it is interlocutory and that its issuance had but one objective in view, to maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase.

As supportive of its claim that the suspension order here involved is reviewable, petitioner relies upon *Atlantic Seaboard Corporation, et al.* v. *Federal Power Commission*, 201 F. 2d 572, but we think that case is clearly distinguishable from the case at bar. Consistent with what we have said above, the Court citing *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, there recognized that Section 19(b) gives the Courts of Appeals power to review an order of the Commission upon the petition of a party aggrieved and that mere preliminary or procedural orders or orders which do not finally determine rights of the parties should not be reviewed thereunder. On the facts there presented, however, the Court concluded that the order there sought to be reviewed was not of that sort, but instead was "sufficiently distinct from the general subject of the litigation and sufficiently final and definitive to justify us in exercising the power

of review vested in us by the statute." Thus, it is apparent that the Court did not undertake in the *Atlantic* case to review an interloctutory order, such as the one we have here, which is not definitive under the announced test for reviewability under Section 19(b).

What is really sought by petitioner is that this Court should halt inquiry at the threshold in order to rule *in limine* upon the propriety of the Commission's action and whether it should proceed further. It may be desirable that the law should provide for a preliminary judicial review of questions of this kind, but in the absence of such a provision we cannot assume that power. If petitioner is correct in any or all of its several contentions relating to the validity of the order, this interlocutory suspension order may infect with invalidity the final, definitive order of the Commission which will issue after hearing had and findings made upon evidence. In that event, upon judicial review of the definitive order, the interlocutory order will be reviewable insofar as it may have affected the final order. The conclusion we have reached that this Court has no jurisdiction to review the suspension order at this time, renders it both inappropriate and unnecessary to pass upon the contentions that the prices involved constituted "initial rates", that the Commission failed to state "reasons" for such suspension as required by the Act, and that the order is contrary to the Natural Gas Act and violates petitioner's rights under the Fifth Amendment to the Constitution of the United States. The petition accordingly will be dismissed for the reason that Section 19(b) of the Act does not confer upon this Court jurisdiction to entertain it and it is so ordered.

BROWN, Circuit Judge, dissenting.

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

Majority Opinion in the Court Below in Companion Cases of Magnolia Petroleum Co. v. Federal Power Commission, No. 15320, et als.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,320

MAGNOLIA PETROLEUM COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,321

THE OHIO OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,352

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,354

WESLEY WEST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petitions for Review of Orders of the Federal Power Commission, Sitting at Washington, D. C.

(June 30, 1956)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: These are separate but companion cases and since they involve substantially similar facts and the same issues of law and come to us on one record they may conveniently be disposed of in one opinion.

All of the petitioners herein have invoked the jurisdiction of this Court, under Section 19(b) of the Natural Gas Act, 15 U.S.C.A. 717r(b), to review certain orders of the Federal Power Commission which petitioners seek to have set aside, vacated and nullified. And all, save Ohio Oil Company, also claim that this Court is empowered under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 1009, to review the action of the Commission in issuing said orders.

It is believed that a history of the occurences which give rise to these petitions for review will be helpful to an understanding of the questions involved. On June 7, 1954, the Supreme Court rendered its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, holding that Phillips, a natural-gas producer and gatherer, was a "natural-gas company" within the meaning of that term as defined in the Natural Gas Act, and that certain of its admitted sales in interstate commerce of natural gas for resale were subject to the jurisdiction of and regulation by the Federal Power Commission.[1] This decision was contrary to the Federal Power Commission's prior interpretation of its jurisdiction over such activities,[2] and its

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[1] Section 1(b) of the Natural Gas Act, 15 U.S.C.A. 717(b), provides: "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

[2] See 18 C.F.R. 2.54(b) which, prior to its being rescinded by Order No. 154, July 20, 1950, provided: "For the purpose of administering the Natural Gas Act, the Commission will construe the exemption contained in Section 1(b) [15 U.S.C.A. 717(b)], to the effect that the provision of the act shall not apply to the 'production or gathering' of natural gas, as including arm's length sales of natural gas, by independent producers and gatherers, made during the course or upon completion of production and gathering. . . ."

immediate impact was to charge the Commission with the regulation of a great number of hitherto unregulated jurisdictional sales. Thus confronted with numerous practical considerations in adjusting its activities to the Court's interpretation of its regulatory sphere, the Commission on July 16, 1954, without prior notice of hearing, issued its order 174 amending and supplementing its long-existent rules and regulations under the Natural Gas Act, 18 C.F.R., Chatper 1, Subchapters A and E through G. These original rules were directed principally to interstate pipeline companies, but since by their terms they speak only of "natural-gas companies,"[3] the Commission concluded that save for the issuance of Order 174, they would have been applicable also to jurisdictional sales in the production and gathering portion of the natural-gas business.[4]

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[3] A "natural-gas company" is defined in Section 2(6) of the Natural Gas Act as ". . . a person engaged in the transportation of natural gas in interstate commerce, *or the sale in interstate commerce of such gas for resale.*" *15 U.S.C.A.* 717 ª (6). (Italics ours.)

[4] The prefatory statement in Order No. 174 reads in part as follows:

"The rules and regulations heretofore adopted by the Commission pursuant to Sections 4 and 7 of the Act have been directed *principally* to interstate pipeline companies. *Those producers and gatherers which come within the class found by the United States Supreme Court in the Phillips case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act,* to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a *reasonable cut-off date should be fixed in order to avoid confusion in attempting to readjust past transactions. Therefore, we have determined to provide* in the first instance, and subject to our further order, *reasonably simply rules and regulations applicable to these companies.* For these and other reasons, good

The Commission's long-established rules, as well as Order 174, were issued under the rule-making authority vested in the Commission by Section 16 and were designed to implement Sections 4, 7, and 8 of the Act.[5] Order 174 prescribed rules and regulations applicable only to "in-

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cause exists for making the rules and regulations herein adopted effective on less than 30 days' notice and for making such rules and regulations applicable to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court decision in the Phillips Petroleum Company case.

"Although the decision of the Supreme Court is, of itself, notice to all 'independent producers', as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.

"Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7,1954, henceforth." (Italics ours.) 19 Federal Register 4535.

[5] Section 4(c) of the Natural Gas Act requires every natural-gas company to file with the Commission schedules of its rates and charges in such form as the Commission may designate and prescribe in its regulations. Section 4(d) prohibits, with certain exceptions, changes in rates except after 30 days' notice to the Commission and the public. Section 7(b) forbids the abandonment of facilities or service without the permission and approval of the Commission first being obtained. Section 7(c) prohibits engagement in operations subject to the Commission's jurisdiction unless a certificate of public convenience and necessity has been obtained from the Commission. Section 7(d) requires that applications for certificates be filed in such form, and notice thereof given, as the Commission may require. Section 8(a) authorizes the Commission to prescribe a system of accounts and classification of companies, and requires every natural-gas company to conform its accounts thereto.

dependent producers," that is, natural-gas companies in the producing and gathering area of the business, and they were therein defined as "any person . . . who is engaged in the production and gathering of natural gas and who transports . . . or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline." Among other things these rules and regulations prescribed the procedure to be followed by all independent producers, who, on or since June 7, 1954, had engaged in the interstate transportation or sale of natural gas subject to the Act, by providing that they were to: (1) file on or before October 1, 1954, their rate schedules in force on June 7, 1954, and the contracts effective as of June 7 were permitted to be filed as such "rate schedules"; (2) make no changes in the June 7, 1954, rates except after thirty days' notice to the Commission and subject to its right to suspend such changes; (3) apply to the Commission for certificates of public convenience and necessity covering the sale of such gas as is subject to the jurisdiction of the Commission; and (4) continue any sales or services rendered until termination was given the express approval of the Federal Power Commission in accordance with Section 7(b) of the Act. The Commission contends that the rules and regulations provided by Order 174 were formulated with these fixed objectives in view: (a) to relieve independent producers of accounting requirements and the maintenance of accounts under the Commission's Uniform System of Accounts; (b) to provide for simplified filing of gas sales contracts instead of converting such contracts into tariff form before filing and for simplified rate change procedures; and (c) to provide for simplified requirements and limited data in support of applications for certificates of public convenience and necessity.

Thereafter and upon further consideration, the Commission on its own motion amended and modified Order 174 by the superseding Order 174-A which was issued

on August 6, 1954. Following the action of the Commission, petitioners in company with more than one hundred other persons and corporations applied for a rehearing and stay of Order 174-A. In their applications the validity of the order was challenged on numerous grounds, and, with the exception of Ohio Oil Company, each of the petitioners in its application for rehearing sought to have the Commission make a separate jurisdictional finding that it was not a "natural-gas Company" within the meaning of that term as defined in the Natural Gas Act. By an order issued on September 8, 1954, the Commission afforded all applicants who had questioned the lawfulness of Order 174-A an opportunity to submit briefs and oral argument on the applications for rehearing, but denied all requests for stay, assigning as reasons therefor the following:

> "In the absence of the rules provided by Order No. 174-A, the more stringent rules generally in effect and applicable to all natural-gas companies would be applicable to producers and gatherers who are also natural-gas companies under the Natural Gas Act (18 CFR, Chap. I, Parts 154 and 157). Accordingly, request for stay of Order No. 174-A is without reasonable justification and must be denied." 19 Federal Register 5952.

After the filing of briefs and after oral arguments were had, the Commission, on September 24, 1954, amended Order 174-A in a respect immaterial to the petitions here, and extended the time for compliance with the regulations prescribed therein from October 1 to December 1, 1954, but took no further action at that time on the applications for rehearing. Following this action by the Commission, each of the petitioners filed in this Court a petition for review requesting a stay of Order 174-A pending final hearing on their petitions for review. Stays were granted to Magnolia Petroleum Company and to Ohio Oil Company, but not to either Superior Oil Company or Wesley West.

On December 17, 1954, which was subsequent to the time when true and correct copies of the documents reflecting all of the action taken by the Commission in issuing Orders 174 and 174-A had been certified and filed in this Court, the Commission further amended Order 174-A and expressly denied all applications for rehearing thereof. The revised sections were published together with the unchanged portions of that order and the order as so revised was designated as Order 174-B.[6] Thereupon Magnolia filed a supplemental petition for review in which it directed against Order 174-B all objections which it had previously made against Order 174-A. Superior by way of a responsive pleading likewise requested that its original petition be considered as directed against and as equally applicable to both orders. In the meantime the Commission had filed motions to dismiss against Magnolia and Ohio and had moved to vacate the stay orders which had been granted to those petitioners, but no motions to dismiss were filed as to Superior and Wesley West.

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[6] In this order the Commission also made it clear that the purpose of the order was not to determine status when it stated:

"• • • A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the Act by the decision of the United States Supreme Court in Phillips Petroleum Company v. Wisconsin, et al., 347 U.S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions."

At the outset it should be noted that the Commission urged no objection to this Court's considering the two supplemental requests for review of Order 174-B. While we are of opinion that the ultimate result in these cases will not be affected in the slightest degree by our consideration of Order 174-B, we are nevertheless and by virtue of Section 19 of the Natural Gas Act expressly precluded from considering petitioner's objections thereto for the reason that they have not been previously presented to the Commission in a petition for rehearing. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498. Accordingly, we shall confine our discussion to Order 174-A.

In their petitions for review of Order 174-A, petitioners assert that the order is reviewable, and although they deny that they are "natural-gas companies," petitioners nevertheless insist that they are "independent producers" within the definition of the order and as such they have standing to petition for review. As grounds for vacating, setting aside and nullfying the order, they set forth numerous specifications of error[7] in which they contend

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[7] The divers specification of error, most of which are common to all petitioners though not identically phrased or bottomed upon the selfsame reasons, are substantially as follows:

1. Order 174-A was issued without hearing and without any findings by the Commission of facts based on evidence in support thereof, all in violation of and contrary to the Administrative Procedure Act and Natural Gas Act.

2. The order was issued without notice thereof and without valid or reasonable grounds being given for the waiver of notice, all as required by the Administrative Procedure Act.

3. The order does not allow petitioner sufficient time to comply without causing an undue hardship; and it deprives petitioner of the right to examine the officers of its purchasers regarding the volume of gas purchased which will be transported in interstate commerce.

4. The order, in effect, attempts to regulate the production and gathering of gas by petitioner and others, although under the

that its formulation and substance violate in certain particulars their rights under the Fifth and Tenth Amendments to the Constitution of the United States, and were contrary to the provisions of the Natural Gas Act and the Administrative Procedure Act. In addition they uniformly contend that although Order 174-A purports to be procedural in form, it is actually final and adjudicatory in that it requires and inhibits certain actions, violates their substantive rights and causes them irreparable injury, all of which, under the authority of *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, make the order subject to review in this Section 19(b) proceeding. In

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Natural Gas Act such operations are specifically excluded from the jurisdiction of the Commission.

5. The order, if enforced, would deny the right to petitioner to determine by its own judgment whether it will or will not further operate in the production and sale of natural gas and the delivery thereof to pipe lines, for transmission in interstate commerce, and whether it will or will not be subject to regulation by the Commission and submit any of its business affairs and operations to the Commission's control.

6. The order, attempting to fix prices under petitioners' contracts as of June 7, 1954, and prohibiting any increase thereof, is arbitrary and unreasonable and in violation of the Commission's statutory authority for the fixing of rates or the setting aside of existing rates; and the order, insofar as it purports to so fix rates and insofar as it attempts to prohibit the increase of prices for gas sold by petitioner under its contracts, is in further violation of the statutory authority of the Commission.

7. The order, if enforced, would result in taking petitioner's property without due process of law; and said order would further operate as an arbitrary and unreasonable restraint on and denial of petitioner's liberty of contract, all in violation of the Fifth Amendment to the Constitution of the United States.

8. The Commission has heretofore in various dockets approved the contracts which petitioner has entered into with purchasing companies who may move such gas in interstate commerce. In granting certificates of public convenience and necessity to the purchasing companies the Commission cannot change the rate, charge or classification provided in such contracts without first

the alternative, they contend that if the order does consist only of procedural rules and regulations, it is nonetheless void for the reason that before the order was adopted petitioners were not accorded the notice and hearing to which they were entitled under the Natural Gas Act and the Administrative Procedure Act.

The Commission on the other hand vigorously insists that this Court has no jurisdiction to entertain the petitions for review (1) because petitioners have not exhausted the administrative remedies which are available to them; (2) because petitioners are not "aggrieved" by the order; and, (3) because Section 19(b) of the Natural Gas Act does not provide for review in this Court of orders which merely promulgate procedural rules of general applicability.

We agree with the Commission that Order 174-A is not judicially reviewable under Section 19(b) for the reason that it is not an "order" which satisfiies the distinctive and controlling conditions to bring it within the purview

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granting petitioner a hearing with respect thereo as is provided in the Natural Gas Act.

9. The orde., insofar as it attempts or purports to require petitioner to apply for certificates of public convenience and necessity, to continue with its operations and the sale of natural gas for transmission in interstate commerce, and, insofar as it purports to forbid petitioner discontinuing any service being rendered on the date thereof for the sale of natural gas, is further in violation of the Fifth Amendment to the Constitution of the United States in that it would take petitioner's property without due process of law and would also take petitioner's private property for public use without just compensation.

10. The order, insofar as it purports to prohibit the discontinuance of production by petitioner of any gas or the deliveries thereof, or from decreasing the amount of gas being delivered, or insofar as it requires production and delivery of gas in any quantities, is contrary to and invades the rights reserved to the States for the regulation and conservation of natural resources by State authority; and the order, therefore, is in violation of the Tenth Amendment to the Constitution of the United States.

of the statute. By Section 19(b) Congress formulated the exclusive conditions under which resort to this Court may be had when it provided that: "any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals . . ." This language of the statute does not authorize a review of *every* order that the Commission may make and the context of Section 19(b) makes clear the nature of the orders which are reviewable in this Court by requiring that, upon service of the petition for review, the Commission is to certify and file with the Court of Appeals, "a transcript of the record upon which the order complained of was entered." The review provisions of Section 19(b) thus relate solely "to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 385;[8] *United Gas Pipeline Co.* v. *Federal Power Commission*, D.C. Cir., 181 F. 2d 796, 798-799, cert. den. 340 U.S. 827. It is therefore clear from the language employed as it is from the authorities that the statute in terms contemplates review by this Court of definitive orders entered after hearing and upon completion of the administrative process. Applying this test to Order 174-A it is clear that it did not result from such a hearing upon evidence, and the regulations prescribed therein do not constitute "findings." Indeed under the rule-making power granted in Section 16 of the Act, there was no requirement for either notice or hearing prior to the issuance of such regulations. So, irrespective of any label placed upon it by the Commission or the petitioners, we think it plain

[8] The review provisions of the Natural Gas Act and the review provisions of the Federal Power Act which were at issue in the *Metropolitan Edison* case are identical in all pertinent respects. See 16 U.S.C.A. 825 l.

that the Commission has simply promulgated regulations of general applicability and not an order reviewable under Section 19(b). The order does not change the petitioners' existing or future status or condition since it is not an adjudication that any particular natural-gas producer is a "natural-gas company" or an "independent producer." The definition of the latter set forth in the order merely enunciates a classification of certain types of "natural-gas companies," but such a classification in a general regulation does not subject any person or corporation to the Commission's jurisdiction. If persons whose sales of natural gas are such as to bring them within the Commission's jurisdiction, this circumstance arises by reason of the Natural Gas Act itself and not by virtue of the order in question. Furthermore, Order 174-A is not a formal determination of any right or obligation; it is not self-executory and it does not command these petitioners to do or refrain from doing anything. The construction of the regulations and their application in particular situations is still in the hands of the Commission, and this being so we cannot under the limitations of Section 19(b) sit in judgment upon practical business consequences where the action to be reviewed does not represent a definitive ruling resulting from a hearing upon evidence. In fine, and as was pertinently pointed out in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 130, an order is not subject to review if it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province."

Much of the argument in these cases is centered around the proposition that Order 174-A is reviewable under Section 19(b) by virtue of the fact that the order requires and inhibits certain actions by the petitioners and has the immediate impact of the sort which led the Supreme

Court in *Columbia Broadcasting* v. *United States, supra,* to regard particular administrative action as ripe for judical review. This argument presupposes that a parallel can be drawn between the order complained of in the *Columbia Broadcasting* case and the order sought to be reviewed here and that petitioners are entitled to the same relief under Section 19(b) as was afforded to appellant in *Columbia Broadcasting* under the review provisions of the Federal Communications Act. The argument is not persuasive. As we have previously said these regulations do not change petitioners' existing or future status and do not subject them to the Commission's jurisdiction. Order 174-A is not a formal determination of any right or obligation, is not self-executory, and does not command these petitioners to do or to refrain from doing anything. Whereas, in the *Columbia Broadcasting* case the very existence of the regulations had, without anything more, an immediate effect on the business of the party attacking them. Furthermore, reviewability under Section 19(b) is not equated with irreparable harm, and is not governed by the same tests as reviewability under Section 402(a) of the Federal Communications Act. Section 402(a), prior to its amendment in 1952, made applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" except order "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operators license." Review of the orders excepted from the provisions of Section 402(a) was by appeal to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) and the review in the Court of Appeals was to be heard upon the record made at the hearing of an application by the Commission. In the *Columbia Broadcasting* case it was not contended by the parties that the

controverted order promulgating licensing regulations was a Section 402(b) order and indeed it was not one. The three-judge District Court in its consideration of the questions there presented determined that it had no jurisdiction to hear the complaint brought by Columbia Broadcasting System for the reason that it did not view the order in question as an "order" within the meaning of Section 402(a). The reasons set forth were that if any of the plaintiffs should thereafter apply for a renewal of licenses and the Commission then adhered to the policy enunciated in the order in question, "the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing . . . Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues . . . Whatever may ordinarily be the proper scope of the word 'order' in the Act . . ., it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such 'orders'."[9] The questions thus posed to the Supreme Court on appeal from this decision were: (1) whether the order in question was an "order" within the meaning of Section 402(a), and (2) if it was such an order, whether the bill stated a cause of action in equity. Considerable doubt had been cast by the lower court's decision as to whether the issues raised in the complaint were relegated to review only after the entry of a Section 402(b) order in which the Federal Communications Commission had effectuated its announced licensing policy. In reversing the three-judge court the Supreme Court concluded that Congress had not precluded a review of these issues under Section 402(a), and held that the order there in question was a reviewable order within the meaning of that section

[9] *National Broadcasting Co.* v. *United States*, 44 F. Supp. 688, 692.

and that the bill of complaint stated a cause of action in equity. In our view the *Columbia Broadcasting* decision adds nothing to petitioners case for review for the Supreme Court decided not whether the order was one subject to review in a court of appeals, but only that the order was an "order" which could be attacked in a district court of three judges in a suit which states a cause of action in equity. Whether, as was suggested by some of the petitioners, Section 19(b) precludes injunction proceedings in a district court to restrain the enforcement of Order 174-A is not properly before us and consequently we need not resolve the apparent conflict in the authorities which bear upon this question.[10]

Having concluded that the orders in question are not reviewable under Section 19(b) of the Natural Gas Act, there remains for discussion the contention of three of the petitioners that we have juridiction to review their petitions under Section 10 of the Administrative Procedure Act. For answer we deem it sufficient to say that we are of opinion that the latter Act adds nothing to our jurisdiction under the Natural Gas Act. Section 10 of the Administrative Procedure Act provides that its provisions are applicable "except so far as (1) statutes preclude judicial review . . ." and the Supreme Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, characterized Section 19(b) as one of the statutes precluding judicial review within the meaning of that section.

In the light of the foregoing and since we hold that we have no jurisdiction to review the regulations in question at

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[10] See *Federal Power Commission, et al.* v. *Union Producing Company*, D.C. Cir., ... F. 2d ...., cert. den.; *United Gas Pipeline Co.* v. *Federal Power Commission, supra*, ... F. 2d ....; *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 3 Cir., 124 F. 2d 800; *East Ohio Gas Co.* v. *Federal Power Commission*, 115 F. 2d 385; *Carolina Aluminum Co.* v. *Federal Power Commission*, 4 Cir., 97 F. 2d 435.

this time the other contentions raised by the parties, all of which have been carefully considered do not merit further discussion. Accordingly, separate judgments will be entered in each of these cases dismissing the petitions for review for lack of jurisdiction.

BROWN, Circuit Judge, dissenting.

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

Judgment

EXTRACT FROM THE MINUTES OF JUNE 30, 1956

No. 15461

UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY,

VERSUS

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of Union Oil Company of California and Louisiana Land and Exploration Company for a review of orders of the Federal Power Commission entered on August 6, 1954, December 17, 1954, October 29, 1954, and December 7, 1954, and was argued by Counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, dismissed for lack of jurisdiction.

"Brown, Circuit Judge, dissenting."

Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,461

UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REHEARING.

Union Oil Company of California and Louisiana Land and Exploration Company respectfully request a rehearing of the appeal herein decided by this Court, Judge Brown dissenting, on June 30, 1956.*

The reasons for the petition are as follows:

I.

THIS COURT ERRED IN HOLDING THAT THE SUSPENSION ORDERS ISSUED HEREIN ARE NOT REVIEWABLE UNDER SECTION 19(b) OF THE NATURAL GAS ACT.

A. Review under Section 19(b) is not Limited to Orders Issued "After Hearing".

This Court erroneously concluded that the Suspension Orders issued herein are not reviewable under Section 19(b) of the Natural Gas Act upon the ground that only orders issued "after hearing" are reviewable under that

* Petitioners were advised that the time for filing of a Petition for Rehearing began to run from July 6, 1956.

section. Thus, this Court stated in its opinion in the *Humble Oil Company* case (No. 15,704), which was regarded as "dispositive" of the question of the reviewability of the Suspension Orders in this case (Slip Opinion herein, p. 7):

> "* * * this statutory review provision of the Act [Section 19(b)] contemplates a review by this Court of definitive orders entered after hearing, and upon completion of the administrative process * * *. Applying this test of reviewability, we have here a situation where the Commission * * * entered an order without a hearing first had." (Slip Opinion in *Humble Oil Company* case, pp. 6-7.) (Emphasis added.)

These statements, in turn, are based upon this Court's discussion of Section 19(b) in its opinion in the *Magnolia* case (Slip Opinion, pp. 12-13), which concludes:

> "It is therefore clear from the language employed as it is from the authorities that the statute in terms contemplates review by this Court of definitive orders entered after hearing and upon completion of the administrative process." (Emphasis added.)

This Court's reading of the statute is in error, because nowhere in Section 19(b) is there any reference to, much less any requirement of, a "hearing" before the Commission. The only substantive requirements are that:

> "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals * * *." (Emphasis added.) (52 Stat. 831 (1938) as amended by the Act of June 25, 1948, 62 Stat. 870.)

The procedural requirement under Section 19(b) that

> "* * * the Commission shall certify and file with the Court a transcript of the record upon which the order complained of was entered * * *.",

likewise contains no reference whatsoever to a hearing, nor is it necessary that any such requirement be implied.

The record upon which the Suspension Orders herein were entered is described in the orders themselves (Union Tr. 118-123) and it consists of the contracts and other papers filed under protest with the Commission by petitioners Union and Louisiana. A transcript of such record *was* certified to and filed with this Court (see Certificate, Union Tr. 459-461).

The error in this Court's interpretation of the language of Section 19(b) is best illustrated by the decision of the U. S. Supreme Court in *United States, et al.* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), which was rendered after the oral arguments in these cases had been concluded. In the *Storer Broadcasting Company* case, it appeared that the Federal Communications Commission had entered an order amending its rules with respect to multiple ownership of standard, FM and television broadcasting stations. In so doing, the Commission acted under a statutory provision which did not require hearing, and none was held, although interested parties were permitted to file statements or briefs (See 351 U. S. at page 193; *cf.* 5 U. S. C. §1003(b)). The owner of a number of radio and television stations filed a petition to review this order in the Court of Appeals for the District of Columbia Circuit, primarily under 5 U. S. C. §1034, providing in pertinent part

> "Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the Court of Appeals, wherein the venue as prescribed by Section 1033 of this title lies, a petition to review such order * * *."

This section is strikingly like Section 19(b) of the Natural Gas Act, except that, unlike Section 19(b), it requires that orders reviewable thereunder be "final" orders.

With respect to reviews brought under Section 5, U. S. C. §1034, it was provided in 5 U. S. C. §1036 that:

> "* * * the agency shall file in the office of the Clerk the record on review, consisting of the pleadings, evidence, and proceedings before the agency * * *." (Emphasis added.)

Notwithstanding the fact that there had been no "hearing" nor any "evidence" adduced before the Commission, the Supreme Court in the *Storer Broadcasting Company* case held that the order there involved was reviewable, stating in part (at 351 U.S. 199):

> "The regulations here under consideration presently aggrieved the respondent. The Commission exercised a power of rule making which controls broadcasters. The rules now operate to control the business affairs of Storer."

In reaching its conclusion that the "authorities" limit Section 19(b) to orders entered "after hearing", moreover, this Court overlooks *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir. 1955), *cert denied, sub. nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 76 Sup. Ct. 649 (1956), in which the Court specifically overruled an objection to its jurisdiction over suspension orders under Section 19(b), based upon the contention that such orders were not entered upon evidence after hearing, stating (227 F. 2d 474):

> "And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review."

Insofar as this Court limits review under Section 19(b) to orders issued "after hearing", its decision is also squarely in conflict with that of the Court of Appeals for the Fourth Circuit in *Atlantic Seaboard Corp.* v. *Federal*

Power Commission, 201 F. 2d 568 (1953). In the *Atlantic Seaboard* case the Court of Appeals for the Fourth Circuit accepted review under Section 19(b) of a suspension order which was issued without a hearing of any kind before the Commission.

These direct authorities should have been followed, rather than a dictum, taken out of context, in a case involving only an order instituting an investigation, which in no way affected the contract rights of the company investigated. (*Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S 375, 385, cited and quoted in Slip Opinion in the *Magnolia* case, pp. 12-13).

B. The Suspension Orders Issued Herein are "Definitive", and not "Interlocutory".

This Court erroneously concluded that the Suspension Orders issued herein are not "definitive", stating in its opinion in the *Humble Oil Company* case, regarded as controlling here:

> "Moreover, the order in question is in no proper sense a definitive order. It is a merely procedural step taken at the inception of and in the completion of the administrative process. A realistic appraisal of the order and the function it performs demonstrates that it is interlocutory and that its issuance had but one objective in view, to maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase" (Slip Opinion in *Humble Oil Company* case, p. 7).

1. This conclusion is erroneous in law because the Commission has overlooked the well-established legal principle that the losses sustained by these petitioners by reason of the fact that they were disenabled from recovering the contract price for the natural gas they sold to Transcontinental from November 1, 1954 through February 7, 1955, are not, and could not in law, be at issue in the

public hearing provided by the Suspension Orders of October 29, 1954, since losses sustained during a period of suspension may not be recouped by rates subsequently allowed. As respects such losses therefore, the Commission's Suspension Orders have been, since the date of their issuance, "final and definitive" and wholly "distinct from the general subject of the litigation." In *Atlantic Seaboard Corporation et al.* v. *Federal Power Commission, et al.*, 201 F. 2d 568 (4th Cir. 1953), the Court of Appeals for the Fourth Circuit, in an unanimous decision, gave as one of the primary reasons for holding an extra-jurisdictional suspension order of the Commission reviewable, that:

> "* * * it is certain that petitioners will not be able to recoup any loss sustained by them over the 22 day period as a result of failure to advance their rates at the same time, even if they are ultimately allowed the increase which they seek in their filing, since losses sustained during a period of suspension may not be recouped by rates subsequently allowed. Hope Natural Gas Co. v. Federal Power Comm., 4 Cir., 196 F. 2d 803, rehearing denied 4 Cir., 197 F. 2d 522."

The fact is that none of the administrative hearings scheduled (and now completed) by the Commission with respect to these petitioners did, or legally could, consider the question of whether petitioners can recoup the losses they incurred as a result of the Commission's Suspension Orders during the period from November 1, 1954 through February 7, 1955.

The only reason why this Court should have awaited any further administrative proceedings is the possibility that some action could or would be taken by the administrative agency with respect to the issue which the Court had before it for review. But insofar as the issue of the Commission's jurisdiction to impose the Suspension Orders is concerned, administrative action was final and complete as of December 7, 1954, when the Commission denied peti-

tioners' Petition for Rehearing and vacation of said orders. As of that date, petitioners had already presented to the Commission in their verified petition the facts which negated the Commission's jurisdiction, and none of those facts were ever in dispute. As appears from the Commission's own order dated December 7, 1954, these undisputed facts relied upon by petitioners were actually considered by the Commission when it adopted its original orders of October 29, 1954—instituting the suspension of petitioners' contract rates (see paragraph (2) of Order, Union Tr. 149).

All of the foregoing is in complete accord with the reasoning and decision of the Court of Appeals for the Fourth Circuit in the *Atlantic Seaboard* case. There, too, the order appealed from was a suspension order and the ground assigned for recognizing it to be appealable was that recoupment of the losses sustained during the period of suspension could not be had in subsequent administrative proceedings. The same is true in the case at bar. In this case, as in that, the losses sustained by reason of the suspension of petitioners' contract rate for the period from November 1, 1954 to February 1, 1955, cannot ever be recouped through administrative procedures. It follows that the sole ground assigned by this Court as a means of distinguishing the *Atlantic Seaboard* case is erroneous.

2. The above quoted conclusion of the Commission is erroneous in fact, because the Suspension Orders operated directly to prevent the performance of petitioners' contracts in accordance with their terms.

Nowhere in its opinion in this case, or in the *Humble Oil Company* case (No. 15,704), does this Court recognize that the Suspension Orders here in question had the direct and immediate effect of keeping in the treasury of Transcontinental money to which these petitioners were entitled under contracts which had been negotiated at arm's length and for which petitioners had given many valuable considerations. Under *Columbia Broadcasting System* v.

United States, 316 U. S. 407 (1942), any order having this direct effect on contracts rights is a final order subject to review.

The error in this Court's attempt to distinguish the *Columbia Broadcasting Company* case upon the ground that it arose under Section 402(a) of the Federal Communications Act, rather than being an appeal under the provisions of Section 402(b) of said Act (see Slip Opinion in the *Magnolia* case, pp. 15-16), is now apparent in the light of the Supreme Court's more recent decision in *United States, et al.* v. *Storer Broadcasting Company,* 351 U. S. 192 (1956). There, in a case arising under the appeal provisions of Section 402(b), similar to Section 19(b) of the Natural Gas Act, the Supreme Court placed strong reliance upon the *Columbia Broadcasting Company* case in upholding the appealability of an order which operated "to control the business affairs of Storer". (See 351 U. S. 199). Of similar import is the Supreme Court's decision in *Frozen Food Express* v. *United States, et al.,* 351 U. S. 40 (1956), holding reviewable an order of the Interstate Commerce Commission listing commodities found not to be "agricultural" within the meaning of Section 203(b) (6) of the Interstate Commerce Act. There the basis for decision was that such a determination by the Commission had:

> "• • • an immediate and practical impact on carriers who are transporting the commodities and on shippers as well" (see 351 U. S. at p. 44).

The *Frozen Food* case, moreover, emphasizes the "definitive" character of an order which subjects one operating in contravention of its terms to criminal penalties (see 351 U. S. at p. 44). This Court erroneously overlooked the fact that the Suspension Orders are mandatory, are directed to these petitioners by name, and would afford the basis for the imposition of criminal penalties for disobedience under Section 20 of the Natural Gas Act (52 Stat. 832; 15 U. S. C. §717(s)).

Other decisions which are in conflict with this Court's determination that the Suspension Orders issued herein are not definitive include *Isbrandtsen Co., Inc.* v. *United States, et al.*, 211 F. 2d 51 (App. D. C. 1953), *cert. denied*, 347 U. S. 990 (1954); and *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334 (1st Cir. 1953), neither of which was cited or discussed in the opinion of the majority of this Court.

3. This Court also erred as a matter of fact and law, in concluding that the substantive effect of the Suspension Orders issued herein was to "maintain the *status quo* between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase" (Slip Opinion in *Humble Oil* case, p. 7). This error, in turn, is closely related to this Court's erroneous conclusion that the case at bar is in fact and in law indistinguishable from that of the *Humble Oil Company*, which involves a step-up type of rate escalation (see Slip Opinion herein, pp. 2, 7).

The situation in the case at bar, however, is entirely distinguishable from a case such as that of *Humble Oil*, involving a fixed, step-up escalation price in a continuing contract. Our case involves new and superseding contracts, under which many new and valuable considerations were given by Union and LLE for the increased price they were promised by Transco. These contracts were executed on November 17, 1953, and became effective by their terms on November 1, 1954.

What ever might be said with respect to a fixed or step-up price escalation clause in an existing contract, the new and superseding contracts of November 17, 1953, created an entirely new deal—a different and distinct *status quo* from that existing before. It cannot be denied that insofar as Union and LLE committed new reserves under these contracts that were furnishing a new "service" under an "initial" rate as of November 1, 1954. In view of the many other new considerations given under the new and

superseding contracts, this Court was in error in not recognizing that the entire transaction involved the giving of a new service for an initial rate.

This is not merely an issue going to the merits. It relates directly to the Commission's jurisdiction.

By issuing the Suspension Orders under Section 4 of the Act, and refusing to recognize its error although requested to do so in our Petition for Rehearing, the Commission made a final and irrevocable determination that it had power to act under Section 4 and that its power or jurisdiction was not limited to proceedings under Section 5 of the Act. Under this analysis, the Suspension Orders did not have the effect of maintaining the *status quo;* instead, they impinged directly and finally upon new contract rights which, under the decision of the Supreme Court in *United Gas Pipeline Company* v. *Mobile Gas Service Corporation, et al.,* 350 U. S. 332 (1956), are to be free from suspension or review under a Section 4 proceeding instituted by the Commission.

Here again, insofar as the Commission's jurisdiction to proceed under Section 4 is concerned, there was not and could not be any further issue in the administrative rate case as to the Commission's power to take action under Section 4. That was decided initially by the Commission's issuance of its Suspension Orders and it was affirmed finally by the Commission's denial of a rehearing of the Suspension Orders. The only issues open for consideration in Dockets G-4331 and G-4332 related to whether or not applicants could sustain under Section 4 their burden of proving that their proposed "increased" rates were just and reasonable within the meaning of Section 4.

By this Court's failure to recognize this important jurisdictional issue, as such, we have been deprived of a hearing thereon.

II.

THIS COURT ERRED IN HOLDING THAT THE COMMISSION'S ORDERS NOS. 174-A AND 174-B ARE NOT REVIEWABLE.

A. Issues Not Identical with Magnolia and Related Cases.

At the outset, this Court was in error in holding (Slip Opinion herein, pp. 1-2) that with respect to the reviewability of 174 series Orders this case presents issues identical to those involved in the *Magnolia* and related cases, No. 15,320, *et al.* Those cases involved only the 174 series Orders, and no suspension orders were issued therein. The fact that suspension orders were issued in this case involves not only the question of the reviewability of the suspension orders, but also of the 174 series Orders. If we are correct in our contention that the suspension orders are definitive and reviewable, we are entitled in these proceedings to have evaluated the legality of the Commission's action in promulgating the 174 series Orders, even though the latter be deemed to be procedural or preliminary in nature. This is based upon the familiar principle that review of a final or definitive order involves also a review of the interlocutory orders and rulings leading up to it.

B. No Requirement for Hearing.

Insofar as this Court's decision with respect to the 174 series Orders is based upon its conclusion that review under Section 19(b) of the Act is limited to orders issued "after hearing" (Slip Opinion in *Magnolia* case, pp. 12-13), we assert error for the reasons specified in Part IA of this Petition for Rehearing.

C. The 174 Series Orders are Definitive.

Insofar as this Court's decision with respect to the 174 series orders is based upon its conclusion that said orders are not definitive and were issued prior to the completion

of the administrative process, said decision is erroneous in fact and in law. It is erroneous in fact because, for the reasons discussed in our briefs and further elaborated in the dissenting opinion of Judge Brown (Slip Dissenting Opinion, pp. 12-34), said orders had a direct and immediate impact upon the contract rights of petitioners Union and LLE, upon the conduct of their businesses, and upon the value of their respective properties. In addition to the cases heretofore cited in our briefs, the reviewability of orders having such effects under comparable statutory review provisions are established by decisions of the U. S. Supreme Court rendered after briefs had been submitted and oral argument had been completed in these cases. *U. S. et al.* v. *Storer Broadcasting Company,* 351 U. S. 192 (1956); *Frozen Food Express* v. *U. S. et al.,* 351 U. S. 40 (1956). Of similar import is the decision of the United States Court of Appeals for the 7th Circuit in *G. J. Amshoff, et al.* v. *U. S. et al.,* 228 F. 2d 261 (7th Cir. 1956), *cert. denied* 351 U. S. 939 (1956).

III.

THIS COURT ERRED IN REFUSING TO PASS ON THE QUESTION WHETHER THESE PETITIONERS ARE SUBJECT TO THE PROVISIONS OF THE NATURAL GAS ACT.

This Court erred in refusing (Slip Opinion herein, p. 7) to pass on the question whether these petitioners are subject to the provisions of the Natural Gas Act, in whole or in part. Its refusal was grounded upon the Court's conclusion that the Commission had not made any determination that these petitioners are subject to the Act. This was erroneous, in view of the fact that the Suspension Orders, encompassing all of these petitioners' sales to Transco, in and of themselves constituted a determination that the sales made thereunder were subject to the Act. These petitioners duly requested rehearing of the Suspension Orders upon this ground, *inter alia,* and the same was denied by the Commission.

Conclusion.

For the reasons herein above stated, it is respectfully requested that rehearing be granted.

Respectfully submitted,

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Dated: July 25, 1956.

Certificate.

Loftus E. Becker, Attorney for petitioner Louisiana Land and Exploration Company, hereby certifies that the foregoing Petition for Rehearing is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Loftus E. Becker

Dated: July 25, 1956.

Order Denying Rehearing

EXTRACT FROM THE MINUTES OF AUGUST 21ST, 1956.

No. 15461

UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY,

VERSUS

FEDERAL POWER COMMISSION.

As neither of the judges who concurred in the decision of the Court in the above numbered and entitled cause is of opinion that the petition for rehearing should be granted, it is ordered that the said petition be, and the same is hereby, DENIED.

"Brown, Circuit Judge, Dissents."

U. S. Constitution Provision Involved

U. S. CONSTITUTION, FIFTH AMENDMENT

"No person shall be * * * deprived of * * * property without due process of law."

STATUTES INVOLVED

Pertinent Provisions of the Natural Gas Act

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. Sec. 717, *et seq.*, are the following:

> Section 1. (b) "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the

local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (52 Stat. 821; 15 U. S. C. Sec. 717(b))

Section 4. (a) "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." (52 Stat. 822; 15 U. S. C. Sec. 717c (1946))

Section 4. (c) "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." (52 Stat. 822; 15 U. S. C. Sec. 717c (1946))

Section 4. (d) "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the

manner in which they shall be filed and published." (52 Stat. 822; 15 U. S. C. Sec. 717c (1946))

Section 4. (e) "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the

burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." (52 Stat. 822; 15 U. S. C. 717c (1946))

Section 5. (a) "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." (52 Stat. 823; 15 U. S. C. 717d (1946))

Section 7. (a) "Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by

such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers." (52 Stat. 824; 15 U. S. C. 717f (a) (1946))

Section 7. (b) "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." (52 Stat. 824; 15 U. S. C. 717f (b) (1946))

Section 7. (c) "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of

this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." (52 Stat. 825; as amended 56 Stat. 83 (1942); 15 U. S. C. Sec. 717f (c) (1946))

Section 19. (b) "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission in the

application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 346 and 347)." (52 Stat. 831; 15 U. S. C. 717r (1946))

Section 21. "(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

"(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs." (52 Stat. 833; 15 U. S. C. 717t (1946))

Pertinent Provisions of the Administrative Procedure Act

Section 10. (a) "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (60 Stat. 243; 5 U. S. C. Sec. 1009 (1946))

Section 10. (b) "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunctions or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." (60 Stat. 243; 5 U. S. C. Sec. 1009 (1946))

Regulations of Respondent Involved Order 174-A

United States of America
Federal Power Commission

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper and Seaborn L. Digby.

Docket No. R-138.

In the Matter of:

Compliance by natural-gas producers and gatherers with certificate and rate requirements.

Order No. 174-A (Superseding Order No. 174).

Order Prescribing Regulations governing the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas which are also Natural Gas Companies, and Waiver of Accounting Requirements.

By Order No. 174 issued July 16, 1954 (19 F.R. 4534) the Commission amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Sub-chapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in Phillips Petroleum Company v. Wisconsin et al., 347 U.S. 672.

Upon further consideration of the matter, the Commission finds:

(1) Sections 157.23, 157.24 and 157.25 of the regulations under the Natural Gas Act prescribed by Order No. 174 should be revised, as hereinafter provided, so as to allow those proposing to engage in the transportation or sale of natural gas in interstate commerce as independent producers to use one of the simpler forms of application therein provided and to clarify some of the requirements of those forms, and to clarify Section 154.94. Section 154.102, Posting, should be eliminated and Section 154.103, Applicability, should be re-numbered as Section 154.102.

(2) The other sections in Parts 154 and 157 of the Regulations under the Natural Gas Act prescribed by Order No. 174 which are not being revised or eliminated should be readopted and as so readopted, together with the revised Sections 157.23, 157.24 and 157.25, are necessary and appropriate to carry out the provisions of the Natural Gas Act.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4

of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), orders:

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 "Independent Producer" Defined.—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commisison rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such trans-

portation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchaser, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.93 Rate Schedule Defined—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 Changes in Rate Schedules—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate charge classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed with the Commission pursuant to in any rate schedule, rate, charge, classification or service effective or applicable to a

sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each part to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§154.95 Oral Agreements—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission.

§ 154.96 Filing Date—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

§ 154.97 Cancellation or Termination—When a rate schedule or part thereof is proposed to be canceled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

§ 154.98 Waiver of Notice Requirements—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 Number of Copies—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 Rejection of Rate Schedules and Material Submitted for Filing—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101 Acceptance for Filing not Approval—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 Applicability of Sections 154.91 through 154.101—Sections 154.91 through 154.0 hereof shall be applicable only to those persons specified in Section 54.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 Application for Certificate of Public Convenience and Necessity by Independent Producer—(a) Every

independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. In those instances where a certificate of public convenience and necessity is required of a natural-gas company for the construction or operation of facilities to enable it to take natural gas from another natural-gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously.

§ 157.24 Contents of application. (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State of territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchase by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the

case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2 etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Notice of the application shall be given by applicant by service of a true copy of the application (without the exhibits provided for in § 157.25) upon the State regulatory commission, agency, or official having authority to regulate the transportation or sale of gas in every State in which applicant operated on June 7, 1954 or proposes to operate, or upon the Governor of the State when there is no such State regulatory commission, agency, or official, by delivery of said copy in person or by registered mail.

§ 157.25 Necessary exhibits—There shall be filed with the application as a part thereof the following exhibits. Any information required which is already on file with the Commission may be incorporated by reference. If the application covers operations on June 7, 1954, and the applicant is unable to file any designated exhibit on or before October 1, 1954, a statement setting forth the reasons for

such failure should be submitted in lieu of the appropriate lettered exhibit and a further extension of time for filing the exhibit, not to exceed 90 days, may be granted. The following required exhibits are designed to amplify paragraphs (a) and (b) of § 157.24.

Exhibit A. If applicant represents a group of individuals, satisfactory proof of his authority to file the application.

Exhibit B. A general key map of applicant's facilities for the production, transportation, or sale of natural gas showing:

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in s 157.24 (a)(4)(iv).

The map need be only of sufficient scale and in sufficient detail to show the geographical location of the properties.

Exhibit C. The applicant may submit as many additional exhibits as may be deemed essential for consideration of the application.

§ 157.26 Form of filing—An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§157.27 Other information—The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 Abandonment of Service—No independent producer as defined in Section 154.91 of these Rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained in accordance with Section 7(b) of the Natural Gas Act.

§157.29 Applicability of Sections 157.23 to 157.28—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174 issued July 16, 1954 is hereby rescinded and superseded by this Order.

(F) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

(s) LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

Adopted: July 30, 1954.

Issued: August 6, 1954.

Docket No. R-138.

In the Matter of:

Compliance by natural-gas producers and gatherers with certificate and rate requirements.

Digby, Commissioner, dissenting:

I find it necessary to restate my dissent from the conclusions by the majority of the Commission in connection with this Order since Order No. 174, carrying my dissent, is completely repealed by this Order. I do, however, approve of the changes which this Order makes from the provisions of Order No. 174.

In approaching our responsibilities in connection with the added jurisdiction of the Federal Power Commission over producers and gatherers of gas as outlined in the recent Supreme Court decision, it should be realized that we are dealing with the seventh largest industry in this country and that millions of consumers may be directly affected by our approach to this matter.

It is my opinion that the majority of the Commission has exceeded its rule-making authority in adopting this ex parte and unilateral order. The effect of this order will not only fix rates retroactively to June 7, 1954, but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954. Any retroactive date is arbitrary. There would be as much sanction in law for making these regulations retroactive to the effective date

of the Natural Gas Act in 1938 as any other retroactive date. This, in my opinion, is in violation of the express provisions of the Natural Gas Act which prohibits the fixing of rates retroactively. I also feel that the Order may have the effect of depriving the producers of the provisions of Section 4 of the Natural Gas Act. Under Section 4 of the Natural Gas Act, a natural-gas company may file an increased rate with the Commission, which rate can be suspended by the Commission for a period not to exceed five months after which time the company may collect the increased rate under bond awaiting a final determination by the Commission. In freezing the producer's rate as of June 7, 1954, they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954. Further, original tariffs or rates cannot be suspended by the Commission and the company is entitled under the law to collect the filed rate at least until after an investigation by the Commission with a final determination concerning the rate. In these particulars, at least, it is my opinion that the Order adopted by the majority of the Commission may deprive independent producers, as defined in that Order, of their right of due process of law. The Order adopted by the majority of the Commission requires all independent producers who were selling gas into interstate commerce on June 7, 1954, to file with the Commission their sales contracts as of June 7, 1954. The Order further requires all of these producers to make application to the Commission for certificates of public convenience and necessity authorizing each and every separate sale in interstate commerce. It has been repeatedly stated that there are 2,300 such independent producers. Most of these producers who are selling gas in interstate commerce will have an average of three separate sales which would require a minimum of 6,000 applications for certificates of public convenience and necessity to be filed with the Federal Power Commission not later than October 1, 1954, and this in addition to the filing of all sales contracts under

the rate provisions of the Order. From the records on file with this Commission, it appears that about 80% of all the gas being sold in interstate commerce is sold by approximately 61 companies and that the remaining 20% is sold by over 2,000 small producers in twenty States. It seems to me that a more prudent approach to our regulatory responsibility would call for the institution of separate proceedings in connection with the 61 companies selling 80% of the natural gas with the right afforded to these companies of a public hearing under an order dealing with the rights of the parties in a prospective manner and not imposing regulations retroactively. By requiring the immediate filing of rate schedules and applications for certificates of public convenience and necessity authorizing each sale, I fear the Commission will be unable to see the forest for the trees. I do not suggest that the smaller producers be excused from regulation but I certainly would insist that the rules of the Commission be greatly simplified insofar as they are concerned and that ample time be given to these small producers to orderly comply with the Commission's regulations. I would give serious consideration to a grandfather clause qualification for these producers. I personally know that very few, if any, of the independent producers will have any understanding of their duties after reading the Order by the majority of the Commission. I also know it will be almost impossible for them to secure the services of attorneys who are in a position to tell them what to do without first making a thorough study and research concerning the Commission's rules and regulations which are very voluminous and greatly in need of revision and compiling.

Under the majority opinion, no producer's price can be increased after June 7, 1954, without a proceeding before the Commission. Our records here disclose that some transmission companies are purchasing gas from producers under firm contracts which contain provisions of one kind or another for the increase in the price of gas which has become effective or will become effective

after June 7, 1954, and before any opportunity can be afforded for the Commission to consider a producer's application to increase his rate to the transmission company. For instance, the Texas State Producing Tax becomes effective, according to my information, on September 1, 1954. Most purchase contracts of transmission companies provide for the payment by the purchaser of all or a part of this additional tax. Under the Order, the transmission company will be faced with the problem of paying the additional price and running the risk of never recovering it or refusing to pay it and run the risk of having its gas cut off for the non-payment of the purchase price. Of course, if this should be done, the transmission company would be faced with lawsuits by distributors to whom they are selling under firm contracts. All of these conditions could be properly taken care of by an order approving all existing firm sales contracts made in good faith and at arm's-length up to and including a future date of, say, October 15, 1954. This would give an opportunity to have both the producer and the transmission company before the Commission on the matter of price regulation concurrently and would eliminate many hardships and problems which, in my opinion, are unnecessary. This policy would simply be to continue for the purpose of securing good regulation the same policy which has existed since the adoption of the Natural Gas Act in 1938 and certainly an additional 160 or 90 days under the same rules and regulations which have prevailed in the past would be a small price to pay for an opportunity to approach this greatly enlarged regulation with thought and consideration.

Section 157.23(a) of the Order makes mandatory upon all producers who were selling gas in interstate commerce on June 7, 1954, the obligation to apply to the Federal Power Commission for a certificate of public convenience and necessity to authorize such sale. In this connection, I would like to call attention to the fact that the Natural Gas Act, when passed by Congress, provided for a period

within which any natural-gas company, as defined by the Act, could withdraw from its activities, or, in the absence of such withdrawal, should apply for a certificate of public convenience and necessity. Also, Rule 1.7(c) of the Commission's regulations provides for a declaratory proceeding for the determination of the question of jurisdiction. This Order not only refuses an opportunity to the producers to withdraw from any transaction which makes him a natural-gas company but makes the Order retroactive to June 7, 1954, and, in my opinion, is in violation of the purpose and intention of Congress in adopting the Natural Gas Act. I further feel that Section 7(b) of the Natural Gas Act, dealing with abandonment, may be subject to the interpretation that the abandonment which cannot be made without first obtaining a certificate therefor is the abandonment of facilities which have been certificated or the abandonment of services through such facilities. It is certainly indisputable that the provisions of this section of the Natural Gas Act and its treatment in Section 157.24 of the Order adopted by the majority of the Commission is subject to great doubt and deserves a determination after the interested parties have been given a chance to be heard. Section 157.24 of the Commission's Order makes a determination of this legal issue retroactively and without giving an opportunity to the interested parties to be heard on the subject. There is a strong possibility that this Order violates the due process clause of the Fifth Amendment of the Constitution, as well as the contract clause of Section 10, Article 1, of the Constitution.

It is my considered opinion that the majority of the Commission has permitted good intentions and plausible purposes with reference to immediate and positive action to lead them into error.

S. L. Digby,
Commissioner.

Filed: July 30, 1954.
Issued: August 6, 1954.

Order 174-B

United States of America.
Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matters of:

Compliance by natural-gas producers and gatherers with certificate and rate requirements

Docket No. R.-138.

and

Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies.

Docket No. R-137.

Order No. 174-B.

Order Amending Order Prescribing Regulations Governing the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas which are also Natural Gas Companies, waiving Accounting Requirements, and Relating to Automatic Escalation and Favored Nation Clauses in Contracts for the Sale of Natural Gas by Such Producers and Gatherers.

Docket No. R-138.

1. By Order No. 174-A (superseding Order No. 174) issued August 6, 1954 (19 F.R. 5081), the Commission amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the pro-

duction and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in Phillips Petroleum Company v. Wisconsin, et al., 347 U.S. 672.

2. Numerous petitions for rehearing were filed and rehearing of Order No. 174-A was granted by order issued September 8, 1954 (19 F.R. 5952) for the purpose of receiving briefs and arguments in order that the Commission might determine whether to revoke, rescind or modify that order in any respect. Briefs and comments were filed and oral argument thereon was had on September 22 and 23, 1954. As a consequence, Order No. 174-A was modified by order issued September 24, 1954 (19 F.R. 6301) by which the filing dates prescribed in that order for some purposes were extended from October 1 to December 1, 1954. At the same time a clarifying change was made in the third paragraph of Section 154.94.

3. Upon consideration of the briefs and arguments made herein together with the experience gained in its operations to date under the existing provisions of Order No. 174-A, the Commission is of the opinion that it is necessary and desirable in the public interest and for its own convenience that those portions of its General Rules and Regulations embodied in Order No. 174-A be further amended to read as set out below.

4. Many of the petitions for rehearing, although objecting to the lack of notice when the rules were originally adopted, recommended changes which would be of a distinctively substantive nature. Substantive rules, however, do not appear desirable in connection with the filings with which these rules are concerned and it is the intention of the Commission to relate these rules strictly to procedural matters. A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the

Act by the decision of the United States Supreme Court in Phillips Petroleum Company v. Wisconsin, et al., 347 U.S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

5. Some of the petitions urged that the regulations be amended to relieve small producers from the requirements of the statute. The Act does not provide for exemptions from its requirements, but the regulations for producers are herein revised in Sections 154.91, 154.92, 154.94 and 157.23 to further simplify the filings by small producers.

6. It was also urged that the Commission limit the applicability of the Act to those operators selling gas in interstate commerce after processing or gathering and acting for other working interests. The rules are here revised by the addition of a paragraph in Section 154.91 under which operators may file in those situations where the purposes of the statute as to certificate requirements and rate fixing may be made fully effective, without calling for separate filings by those having working interests, although such interests may also file if they care to do so. It is expected that by this paragraph a large number of parties having working interests may be relieved of the filing requirements, although, of course, they are not and cannot be exempted from the statute, if, by reason of their activities, they come within its terms.

7. The map required in Section 157.25 as an exhibit in support of a certificate application is not intended to be

a topographic survey map but a general sketch. A further exhibit is also required as set forth in paragraph 10 below.

8. The statement in the rules with respect to the abandonment of service has been misconstrued and for that reason is being revised to quote Section 7(b) of the Act. A proviso is added, however, that nothing in the rules shall be construed as interfering with or intended to interfere with or prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production of natural gas.

9. There has been some confusion as to the notices or copies to be furnished to State Commissions and the references thereto in the rules are eliminated. Other minor revisions of a technical or clarifying nature are also made in some of the sections below.

Docket No. R-137.

10. In Docket No. R-137 the Commission has under consideration the desirability of adopting rules within the terms of the Natural Gas Act either in connection with the issuance of certificates of public convenience and necessity whereby contracts between producers and interstate pipeline companies containing automatic escalation and favored nation clauses would be declared not to be admissible as evidence of gas supply, or in connection with rate-making whereby increased payments made under escalation provisions but having no relation to additional or improved service or gas supplies to an interstate transporter could be disallowed, or in some other connection whereby effective action can be taken in the premises pursuant to the terms of the Act.

11. General public notice of proposed rule-making in Docket No. R-137 was given by publication in the Federal Register on May 13, 1954 (19 F.R. 2768) and mailing notices to interested parties, including State and Federal

regulatory agencies. This notice invited data, views, comments, and suggestions concerning the contract provisions mentioned and set oral arguments thereon for September 9, 1954. By notice similarly published on July 22, 1954 (FR 4543) the date for oral argument was continued to November 4, and the argument was heard on November 4 and 5, 1954.

12. Views, comments and suggestions were filed by numerous persons, including the representatives of State regulatory agencies, companies engaged in local distribution of natural gas, interstate pipe-line companies, and independent producers and gatherers. Representatives of all of these diverse interests took part in the oral argument.

13. As a result of the representations submitted both orally and in writing in Docket No. R-137 and in view of the desirability of clarifying the showing to be made in this connection by natural-gas companies seeking certificates of public convenience and necessity, the contracts of sale are hereinafter required as an exhibit in support of an application under Sections 157.24 and 157.25 for a certificate of public convenience and necessity. Escalation clauses of the type referred to in Section 157.25, Exhibit B, below, in the sales contracts of independent producers so submitted should not be considered in support of any application nor given effect by the Commission.

Upon further consideration of the matter, the Commission finds:

(1) Sections 154.91, 154.92, 154.94, 154.95, 154.97, 154.98, 157.23, 157.24, 157.25 and 157.28 of the Regulations under the Natural Gas Act prescribed by Order No. 174-A, as amended by the order issued September 24, 1954 herein, should be further revised for the reasons and in the manner set forth above.

(2) Adoption and promulgation of the proposed revisions are necessary and appropriate to carry out the provisions of the Natural Gas Act.

(3) For convenience, it is appropriate that those sections of Order No. 174-A which are not revised hereby be published together with the revised sections referred to above and that the order as so revised be designated as Order No. 174-B.

(4) The points and issues raised by the petitions for rehearing which are not covered by the revisions hereinafter made should be denied.

(5) From the circumstances referred to in the recitals above set forth, it appears that good cause exists for immediate issuance of the following regulations and it is unnecessary in the public interest that notice or further public proceedings be had prior to the adoption of such revised Regulations.

(6) Upon full consideration of the representations made in Docket No. R-137; escalation clauses of the types referred to in Section 157.25, Exhibit B, below are not in the public interest and such clauses will not be considered as evidence in support of any application for a certificate of public convenience and necessity or for other purposes nor given effect by the Commission.

(7) Further proceedings in Docket No. R-137 are not necessary.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), orders:

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 Applicability.—(a) An "independent producer" as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

(b) The filings with regard to all sales required under § 154.92, § 154.91 and § 157.23 may be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an operator under this paragraph, the parties to the operating arrangement, and those producers who sell to the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operating arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any changes in the several respects since the list was previously submitted.

§ 154.92 Filing of Rate Schedules by Independent Producer.—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the

Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf. annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county, and State) at which delivery is made.

§ 154.93 Rate Schedule Defined.—For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule"

shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

S. 154.94 Changes in Rate Schedules.—(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this Section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed

after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary, to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in the rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the foregoing paragraphs in this Section, file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, country and State) at which delivery is made.

§ 154.95 Oral Agreements.—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in duplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in duplicate, their understanding of the agreement.

§ 154.96 Filing Date.—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.92 through 154.99 of these Regulations.

§ 154.97 Cancellation or Termination.—When a rate schedule or part thereof is proposed to be canceled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

§ 154.98 Waiver of Notice Requirements.—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate

schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 90 days before the effective date.

§ 154.99 Number of Copies.—Two copies of any rate schedule or part thereof, and material required by Section 154.95 to be filed therewith, and Notices of Cancellation or Termination submitted for filing, must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 Rejection of Rate Schedules and Material Submitted for Filing.—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.92 through 154.99.

§ 154.101 Acceptance for Filing not Approval.—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 Applicability of Sections 154.92 through '54.101.—Sections 154.92 through 154.101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 Applications for Certificates of Public Convenience and Necessity by Independent Producer.—(a) Every independent producer of natural gas as that term is defined in Section 154.91 who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before December 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by December 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service

shall be filed within time to enable the Commission to consider all related matters concurrently.

(c) Filings hereunder may be made by an operator as provided in § 154.91 hereof.

§ 157.24 Contents of applications.—(a) Every application for a certificate of public convenience and necessity required under S. 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor.

In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100, Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

§ 157.25 Necessary exhibits.—There shall be filed with the application as a part thereof the following exhibits:

Exhibit A. Map. Each applicant under Section 157.24 shall file as part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A. The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipeline systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a)(4)(iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: Provided, however, That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); and provided further, That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. Escalation clauses in contracts submitted hereunder on or after May 1, 1955 will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

§ 157.26 Form of filing.—An application under § 157.24 or § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 Other information.—The application may be required to furnish such additional information as the Commission may deem pertinent.

S. 157.28 Abandonment of Service.—No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. Provided, however, That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

S. 157.29 Applicability of Sections 157.23 to 157.28.—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The amendments of rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174-A issued August 6, 1954 is hereby revised and as revised herein shall be designated as Order No. 174-B.

(F) The petitions for rehearing filed herein are denied with respect to all other points and issues raised in such petitions.

(G) The proceedings in Docket No. R-137 are hereby terminated.

(H) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

(S.) LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

Adopted: December 16, 1954.
Issued: December 17, 1954.

In the Matters of:

Compliance by natural-gas producers and gatherers with certificate and rate requirements,

Docket No. R-138.

and

Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies.

Docket No. R-137.

Smith and Stueck, Commissioners, concurring:

While concurring—under the circumstances here present—in the action of the Commission, we find ourselves in agreement with so much of what is said in the dissenting opinion that it seems appropriate to state with some particularity our position regarding the two major points covered therein.

We share fully the view that it would be highly desirable, if it were now possible, for the Commission to resolve prevailing uncertainties concerning the sweep of its jurisdiction under the Phillips decision, both to provide proper guidance to the industry affected and to minimize its own administrative burdens and dilemmas.

Depending upon whether prime emphasis is attached to the precise facts presented in the case of Phillips or to the broad language used in the dictum of the Supreme Court's opinion, arguments can be made for either of the extremes of possible interpretations of that decision: that our jurisdiction is limited to the sale of natural gas at the tailgate of the processing plant, or the point where the natural gas enters the interstate pipe line, or in the alternative, that our jurisdiction extends to every wellhead sale in the field, or to the point of the first sale of natural gas for resale, wherever that may be, if interstate commerce turns out ultimately to be involved. Both interpretations have their advocates; both have been urged upon us.

Perhaps the correct answer lies in some as yet undetermined middle ground which would be conducive both to the reasonable and necessary flexibility and the continued good health of a vital industry and to the avoidance of a bogging down under its own weight of the whole regulatory process in the natural gas field. It seems to us that it is clear duty and responsibility of this Commission to take the initiative in seeking such a solution. So long as present uncertainties exist and unresolved questions accumulate, a situation which has been described as one of "administrative chaos" seems likely to exist.

Whether, however, we can now properly and wisely determine the precise boundaries of our jurisdiction in the areas of production and gathering is another matter. The question appears to have its substantive aspects, which might require further and more specific notice than that provided in this proceeding,—notwithstanding the fact that some of those who argued on rehearing went rather fully into this phase of the matter. Apart from that, certain of these issues are sharply posed in several proceedings now in hearing before us which, it is to be hoped, may well add to our understanding of the practical aspects and ramifications of these complex matters. It is for these reasons that we join in the Commission's deferral of a more direct

and satisfactory answer—through administrative definitions and rules of general application, which we think should be promulgated when it is feasible to do so—to this very important question at the present time.

Similarly, we are impressed by the strong arguments which have been made for the proposition that existing contracts under which sales of natural gas were being made by producers and gatherers to interstate pipelines on June 7, 1954, and which the Commission's Order No. 174-A, as modified on September 24, 1954, has required to be filed by December 1, 1954, are to be regarded as complete entities, so that all of their terms—and not just certain selected segments—should be treated as initial rates. Failure to so treat them in effect, it seems to us, in many instances—particularly where stated price adjustments, upward or downward, are provided for on a definite and strictly adhered to periodic basis—might involve grave injustice and disregard some very elementary, obvious and important economic facts of life.

This, however, is not to say that we are compelled, as a matter of law, to so regard these filings, and therefore to disclaim all authority to suspend and, after notice, to examine into the reasonableness from every point of view, of changes in the charges provided for under such contracts before they may become fully effective. It does seem to us that such provisions contained in pre-existing arm's-length contracts are entitled to great weight and, as initial filings, may fairly be considered as prima facie reasonable. Indeed, many, if not most, of them have been fully disclosed to all interested parties and relied upon in certificate proceedings where new pipe-line projects or extensions or enlargements of existing systems have been approved after being strongly supported by all concerned.

These are factors which, in our judgment, should be taken into account by the Commission and may well be controlling when, in the exercise of its administrative discretion under Section 4 (e) of the Natural Gas Act, it is considering whether or not to suspend rate changes. But we are

not now persuaded that in all such situations the Commission is, as a matter of law, confined to investigations pursuant to Section 5 of the Act,—which avenue of approach is, of course, always open to us in any situation wherein the reasonableness of rates subject to our jurisdiction is at issue.

Here again, however, it seems to us probable that the Commission will gain further information and knowledge regarding the impacts and significance of this facet of the problem during the course of the proceedings in Docket No. R-142, which are now scheduled to open on January 11, 1955. Therefore we deem it wise to defer action on this aspect of the matter for the present.

As indicated above, it is our understanding that, as to both of the points so ably developed in the dissenting opinion, the Commission is by its action at this time in no manner or degree foreclosing further consideration, and in no way precluding the future disposition, of these issues through the promulgation of interpretative rules of general application in appropriate proceedings, should the feasibility of such a course subsequently appear to be greater than it now does. On the contrary, the earlier supersession of Order No. 174 by Order No. 174-A, and the latter's amendment by the instant Order No. 174-B demonstrate, we believe, the Commission's willingness to follow a properly pragmatic approach to the problems entailed in its newly defined jurisdiction in the areas of production and gathering. We confidently expect, therefore, that further clarifications and refinements of a practical nature will be possible as we gain additional experience and understanding in these new fields of regulation.

NELSON LEE SMITH,
Commissioner,

FREDERICK STUECK,
Commissioner.

Filed: December 16, 1954.
Issued: December 17, 1954.

In the matters of:

Compliance by natural-gas producers and gatherers with certificate and rate requirements,

Docket No. R-138.

and

Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies.

Docket No. R-137.

Digby, Commissioner, dissenting:

Without restating my dissent from Order No. 174-A, I wish to adopt it by reference.

Agreeable to information submitted and experience gained since the issuance of Order No. 174-A I dissent from this amendment of that order.

First: I believe that it is the Commission's responsibility and duty to define its jurisdiction over independent producers and gatherers of natural gas. Without such a decision by the Commission, hundreds of independent producers will file applications for certificates of public convenience and necessity, together with rate filings, in transactions entirely outside of the jurisdiction of the Federal Power Commission. By a positive determination at this time by the Commision, orderly regulation would be greatly advanced both with reference to certificate proceedings and rate filings and proceedings. In this connection, I would have the Commission give a broad but limiting definition of sales of natural gas by independent producers, gatherers, and processors of natural gas subject to regulation under the Natural Gas Act. The only provision in the Natural Gas Act as interpreted by the Court decisions thereon concerning jurisdiction over producers and gatherers of gas is a reference to a "sale in interstate commerce of natural gas for resale." When the sale is made to a person who gathers gas and processes it in the state

where it is produced and then the residue is sold in interstate commerce for resale, the first transaction, in my opinion, is purely a local one and not a sale in interstate commerce of natural gas for resale. This conclusion is certainly supported by the provisions of the Natural Gas Act. Section 1(b), applies "to the sale in interstate commerce . . . for resale" but "shall not apply to any other . . . sale." The Act does not, and the Court opinions do not, imply that it applies to the sale for resale in interstate commerce but only "to the sale in interstate commerce for resale." It is my opinion that this order should define a jurisdictional sale of natural gas under the Natural Gas Act as a direct sale of natural gas in interstate commerce for resale, which sale of natural gas shall include all natural gas dedicated by contract for sale in interstate commerce for resale. In agreement with the language of the Act, I would prescribe that no other sales of natural gas are subject to the jurisdiction of the Federal Power Commission. In the Supreme Court decision in the Phillips case, the Court stated that Phillips admitted that it engaged in "the sale in interstate commerce . . . for resale." Therefore, the question of the sale in interstate commerce for resale was not an issue. The Court went to great lengths in detailing the facts concerning the wholesale sale by Phillips at the tailgate of its processing plant after production, gathering, and processing of the gas. It has been argued with much force that a well-head sale of natural gas, even though it be a direct sale in interstate commerce for resale, is not subject to regulation for the reason it is neither a wholesale sale nor a sale in interstate commerce for resale after production and gathering have intervened. At the outset, in discussing this point, I expressed a view in favor of a broad but limiting definition of sales subject to regulation. I consider the definition which I have used to be broad and perhaps inclusive of some sales such as well-head sales which may be determined by the Courts to be non-jurisdictional.

Second: It is my opinion that all fixed escalations or different prices of gas denominated in mills or cents contained in good faith arm's length contracts in existence of the effective date of Order No. 174-A should be accepted as a part of the original rate and constituting one tariff or rate schedule not subject to suspension under Section 4 of the Natural Gas Act. These contracts were entered into at a time when the contracting parties had no thought of regulation of the price under the authority of the Natural Gas Act. Most of the contracts were entered into for long terms and supported by a dedication of gas reserves in compliance with requirements of of the Federal Power Commission in certificate proceedings by transmission companies Order No. 174-A reguires that all of these contracts be filed as rate schedules. Under the provisions of the Natural Gas Act and in rate regulation in general the filer of an original rate schedule has a legal right to file an original rate of his own choosing, subject of course to investigation upon complaint by an interested party or at the instance of the Federal Power Commission but not subject to suspension under Section 4 of the Natural Gas Act. The financial feasibility of transmission lines and distribution systems were predicated upon the over all price conditions contained in these contracts. Securities issued and sold upon this understanding of the transaction are held by thousands of people who will be directly affected by our treatment of this subject. Accepting these original rate schedules including periodic changes in the price of gas would not be an approval of the rate as fair and reasonable but would simply treat the changes as component parts of an original rate schedule not subject to suspension.

SEABORN L. DIGBY,
Commissioner.

Filed: December 16, 1954.
Issued: December 17, 1954.

Suspension Orders Issued Against Petitioners
Orders Issued October 29, 1954

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matter of:

Union Oil Company of California.

Docket No. G-4331.

Order Suspending Proposed Changes in Rates.

Union Oil Company of California, on September 30, 1954, tendered for filing proposed changes in presently effective rate schedules for sales subject to the jurisdiction of the Commission. The proposed changes, which constitute increased rates and charges, are contained in the following designating filings which are proposed to become effective on the dates shown:

Description—Purchaser—Rate Schedule Designation—Effective Date.[1]

Contract, dated November 17, 1953, Transcontinental Gas Pipe Line Company, FPC Gas Rate Schedule No. 2, November 1, 1954.

Letter, dated November 4, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 1, to FPC Gas Rate, Schedule No. 2, November 1, 1954.

Letter, dated November 17, 1953, Trancontinental Gas Pipe Line Company, Supplement No. 1, to FPC Gas Rate Schedule No. 2, November 1, 1954.

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[1] The stated effective date is the first day after expiration of the required thirty days' notice, or the effective date proposed by Respondent if later.

Supplemental Agreement, dated July 8, 1954, Transcontinental Gas Pipe Line Company, Supplement No. 3, to FPC Gas Rate Schedule No. 2, November 1, 1954.

Contract, dated November 17, 1953, Transcontinental Gas Pipe Line Company, FPC Gas Rate Schedule No. 3, November 1, 1954.

Letter, dated November 17, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 1, to FPC Gas Rate Schedule No. 3, November 1, 1954.

Contract, dated November 17, 1953 Transcontinental Gas Pipe Line Company, FPC Gas Rate Schedule No. 4, November 1, 1954.

Letter, dated November 17, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 1, to FPC Gas Rate Schedule No. 4, November 1, 1954.

The increased rates and charges proposed in the aforesaid filings have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

The Commission finds:

It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed changes, and that the above-designated supplements be suspended and the use thereof deferred as hereinafter ordered.

The Commission orders:

(A) Pursuant to the authority contained in Sections 4 and 15 of the Natural Gas Act, a public hearing be held upon a date to be fixed by further order concerning the lawfulness of said proposed changes in rates and charges; and, pending such hearing and decision thereon, the above-designated rate schedules and supplements be and they are each hereby suspended and the use thereof deferred for a period of five months beyond the above-stated effective date and for such further time until they are made effec-

tive in the manner prescribed by the Natural Gas Act, subject to further order of the Commission.

(B) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) [18 CFR 1.8 and 1.37 (f)] of the Commission's Rules of Practice and Procedure.

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: October 27, 1954.
Issued: October 29, 1954.

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuydendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matter of:

Union Oil Company of California, et al.

Docket No. G-4332.

Order Suspending Proposed Changes in Rates.

Union Oil Company of California, et al.,[1] on September 30, 1954, tendered for filing proposed changes in presently effective rate schedules for sales subject to the jurisdiction of the Commission. The proposed changes which constitute increased rates and charges, are contained in the following designated filings which are proposed to become effective on the dates shown:

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[1] Other party: Louisiana Land and Exploration Company.

[2] The stated effective date is the first day after expiration of the required thirty days' notice, or the effective date proposed by Respondent if later.

Description—Purchaser—Rate Schedule Designation—Effective Date.[2]

Contract, dated November 17, 1953, Transcontinental Gas Pipe Line Company, FPC Gas Rate Schedule No. 5, November 1, 1954.

Letter, dated November 17, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 1, to FPC Gas Rate Schedule No. 5, November 1, 1954.

Letter, dated November 17, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 2, to FPC Gas Rate Schedule No. 5, November 1, 1954.

Contract, dated November 17, 1953, Transcontinental Gas Pipe Line Company, FPC Gas Rate Schedule No. 6, November 1, 1954.

Letter, dated November 17, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 1, to FPC Gas Rate Schedule No. 6, November 1, 1954.

Letter, dated November 17, 1953, Transcontinental Gas Pipe Line Company, Supplement No. 2, to FPC Gas Rate Schedule No. 6, November 1, 1954.

The increased rates and charges proposed in the aforesaid filings have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful.

The Commission finds:

It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed changes, and that the above-designated supplements be suspended and the use thereof deferred as hereinafter ordered.

The Commission orders:

(A) Pursuant to the authority contained in Sections 4 and 15 of the Natural Gas Act, a public hearing be held upon a date to be fixed by further order concerning the lawfulness of said proposed changes in rates and charges; and,

pending such hearing and decision thereon, the above-designated rate schedules and supplements be and they are each hereby suspended and the use thereof deferred for a period of five months beyond the above-stated effective date and for such further time until they are made effective in the manner prescribed by the Natural Gas Act, subject to further order of the Commission.

(B) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) [18 CFR 1.8 and 1.37 (f)] of the Commission's Rules of Practice and Procedure.

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: October 27, 1954.
Issued: October 29, 1954.

Suspension Orders Issued December 7, 1954

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matter of:
Union Oil Company of California.

Docket No. G-4331.

Order Modifying Order Suspending Proposed Changes in Rates and Denying Petition for Reconsideration and Vacation of the Suspension Order.

By order issued October 29, 1954, the Commission, among other things, suspended and deferred the use of certain filings made by Union Oil Company of California (Union Oil) on September 30, 1954, proposing changes in effective

rate schedules for sales of gas subject to the jurisdiction of the Commission. As provided in said order, the period of suspension and deferred use would terminate on March 31, 1955, subject to further order of the Commission.

On November 12, 1954, Union Oil filed a petition for reconsideration and vacation of the aforementioned order. Also on November 12, 1954, Transcontinental Gas Pipe Line Company, the purchaser under the affected rate schedules, filed a statement in support of Union Oil's petition.

The Commission, upon further consideration of said order, and upon consideration of said petition and statement, finds:

(1) The said order issued October 29, 1954, should be modified as hereinafter provided.

(2) The said petition for reconsideration and vacation sets forth no new facts and no principles of law which either were not fully considered by the Commission when it adopted its order issued October 29, 1954 or which having been considered warrant any change in, or modification of, such order, other than herein specifically provided.

The Commission orders:

(A) Paragraph (A) of the order issued herein on October 29, 1954, be and it is hereby amended to read as follows:

"(A) Pursuant to the authority contained in Sections 4 and 15 of the Natural Gas Act, a public hearing be held upon a date to be fixed by further order concerning the lawfulness of said proposed changes in rates and charges; and, pending such hearing and decision thereon, the above-designated rate schedules and supplements be and they are each hereby suspended and the use thereof deferred for a period of three months beyond the above-stated effective date and for such further time until they are made effective in the manner prescribed by the Natural Gas Act, subject to further order of the Commission."

(B) Except as herein specifically modified, said order issued October 29, 1954, shall remain and continue in full force and effect.

(C) The aforesaid petition for reconsideration and vacation of said order be and it is hereby denied.

By the Commission. Chairman Kuykendall dissented and stated that the purchaser of this natural gas is Transcontinental Gas Pipe Line Corporation, which has heretofore filed increased rates, in anticipation of this additional expense, which have been suspended until April 1, 1955. He further stated that it appears to him that in this difficult situation, the most equitable action would be to make the date of termination of the two suspension periods coincide.

LEON M. FUQUAY,
Secretary.

Adopted: November 29, 1954.

Issued: December 7, 1954.

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matter of:
Union Oil Company of California, et al.
Docket No. G-4332.

Order Modifying Order Suspending Proposed Changes in Rates and Denying Petition for Reconsideration and Vacation of the Suspension Order.

By order issued October 29, 1954, the Commission, among other things, suspended and deferred the use of certain filings made by Union Oil Company of California, et al. (Union Oil) on September 30, 1954, proposing changes in

effective rate schedules for sales of gas subject to the jurisdiction of the Commission. As provided in said order, the period of suspension and deferred use would terminate on March 31, 1955, subject to further order of the Commission.

On November 12, 1954, Union Oil filed a petition for reconsideration and vacation of the aforementioned order. Also on November 12, 1954, Transcontinental Gas Pipe Line Company, the purchaser under the affected rate schedules, filed a statement in support of Union Oil's petition.

The Commission, upon further consideration of said order, and upon consideration of said petition and statement, finds:

(1) The said order issued October 29, 1954, should be modified as hereinafter provided.

(2) The said petition for reconsideration and vacation sets forth no new facts and no principles of law which either were not fully considered by the Commission when it adopted its order issued October 29, 1954, or which having been considered warrant any change in, or modification of, such order, other than herein specifically provided.

The Commission orders:

(A) Paragraph (A) of the order issued herein on October 29, 1954, be and it is hereby amended to read as follows:

"(A) Pursuant to the authority contained in Sections 4 and 15 of the Natural Gas Act, a public hearing be held upon a date to be fixed by further order concerning the lawfulness of said proposed changes in rates and charges; and, pending such hearing and decision thereon, the above-designated rate schedules and supplements be and they are each hereby suspended and the use thereof deferred for a period of three months beyond the above-stated effective date and for such further time until they are made effective in the manner prescribed by the Natural Gas Act, subject to further order of the Commission."

(B) Except as herein specifically modified, said order issued October 29, 1954, shall remain and continue in full force and effect.

(C) The aforesaid petition for reconsideration and vacation of said order be and it is hereby denied.

By the Commission. Chairman Kuykendall dissented and stated that the purchaser of this natural gas is Transcontinental Gas Pipe Line Corporation, which has heretofore filed increased rates, in anticipation of this additional expense, which have been suspended until April 1, 1955. He further stated that it appears to him in this difficult situation, the most equitable action would be to make the date of termination of the two suspension periods coincide.

LEON M. FUQUAY,
Secretary.

Adopted: November 29, 1954.
Issued: December 7, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 579

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

Orders No. 174–A and No. 174–B of the Federal Power Commission (Pet. App. 87a–127a) are reported at 19 Fed. Reg. 5081, and 19 Fed. Reg. 8807. The other Commission orders here involved (Pet. App. 128a–136a) are not reported. The opinion of the Court of Appeals (Pet. App. 1a–43a) is reported at 236 F. 2d 816.[1]

[1] The opinions of the court below in *Humble Oil and Refining Co.* v. *Federal Power Commission* and *Magnolia Petroleum Co.* v. *Federal Power Commission*, relied on by the court in this case, are reported at 236 F. 2d 819 and 236 F. 2d 785, respectively. Judge Brown's dissenting opinion in all three cases is reported at 236 F. 2d 793.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (Pet. App. 66a). A petition for rehearing, timely filed, was denied on August 21, 1956 (Pet. App. 80a). The petition for a writ of certiorari was filed on November 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTIONS PRESENTED

1. Whether a Court of Appeals has jurisdiction, under Section 19 (b) of the Natural Gas Act, to review a general order of the Federal Power Commission providing a simplified procedure whereby those independent producers subject to regulation under the Act by virtue of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, may come into compliance with the Act.

2. Whether orders of the Federal Power Commission, setting a hearing on rate increases proposed by independent producers of natural gas and suspending the rate increases pending the hearing in accordance with Section 4 (e) of the Natural Gas Act, is reviewable under Section 19 (b) of the Act where the Commission has neither held the hearing nor finally passed on the propriety of the proposed increases.

3. Whether the Court of Appeals, in the Section 19 (b) proceeding, has jurisdiction to determine whether or not independent producers of natural gas are subject to the Natural Gas Act, although the Commission has not passed upon that question because the producers

have not exhausted the procedures provided by the Commission for its determination.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission Regulations are set forth in the Appendix to the petition at pages 80a–127a.

STATEMENT

By petitions filed in the United States Court of Appeals for the Fifth Circuit, petitioners, independent producers of natural gas, sought review of Federal Power Commission Orders Nos. 174–A and 174–B establishing a procedure for effectuating this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, and two orders of the Commission setting a hearing on proposed rate increases filed by petitioners, and suspending for a three month period the effectiveness of the new rates pending such a hearing. The Court of Appeals dismissed the petitions, holding that the Commission's orders were not reviewable under Section 19 (b) of the Natural Gas Act. The relevant facts may be summarized as follows:

On June 7, 1954, this Court held in the *Phillips* case that the independent producers of natural gas were subject to regulation under the Natural Gas Act to the extent that they engaged in "wholesales of natural gas in interstate commerce" (347 U. S. at 682). Prior to that time, the Federal Power Commission had directed its regulation under the Act to companies engaged primarily in interstate pipeline operations, and activities incident thereto; the rules and orders issued

by the Commission had been mainly designed to implement regulation of such interstate pipeline companies (F. P. C. Order No. 144, 13 F. R. 6371). However, these rules and orders were directed to "natural-gas companies," and so in terms included the independent producers which were held by the *Phillips* decision to be "natural-gas companies." Not wishing to subject these independent producers to the more onerous requirements of the rules and regulations applicable to pipeline companies, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by this Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A which superseded Order No. 174, but made no substantial change in the provisions here involved (19 F. R. 5081).[2]

Order No. 174–A adopted substantially the language of the *Phillips* decision in defining the class of independent producers of natural gas subject to the Act as including those natural gas companies "engaged in

[2] The orders were issued without notice or hearing because the Commission found, in accordance with Section 4 (a) of the Administrative Procedure Act, 5 U. S. C. 1003 (a), that "good cause exists for making the rules and regulations herein adopted effective on less than thirty days notice" in order to minimize the uncertainty and confusion which would result from delay in carrying out this Court's mandate in the *Phillips* proceeding (19 F. R. 4534).

the production or gathering of natural gas and who transport[s] natural gas in interstate commerce for resale * * *'' (347 U. S. 683, 684; Pet. App. 89a). The order did not purport to determine which of the over 4,000 independent producers were subject to regulation under the Act but left such determinations, which frequently involve complex factual questions, to individual hearings.[3] The order required producers subject to the Act to file with the Commission, by October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service (Pet. App. 89a, 93a–94a). When a large number of natural gas producers, including petitioners, filed motions for rehearing and a stay of order No. 174–A, the Commission denied all requests for stays but called for briefs and suggestions as to revision of the order and granted oral argument on the motions

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[3] In issuing Order No. 174 the Commission had stated (19 F. R. 4534):

> Although the decision of the Supreme Court is, of itself, notice to all "independent producers," as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.
>
> Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth.

(Pet. App. 105a). Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (Pet. App. 105a). On December 17, 1954, the Commission amended and reissued Order No. 174–A as Order No. 174–B and denied all applications for rehearing.[4]

In 1948, petitioners had contracted to sell Transcontinental Gas Pipeline Company natural gas produced by them for a period of 20 years (Pet. App. 2a). In November 1953, petitioners and Transcontinental entered into new contracts superseding the 1948 contracts as of November 1, 1954. Under the old contracts, which were still in force when this Court decided the *Phillips* case on June 7, 1954, petitioners received 8.79 cents per mcf for their gas before tax reimbursement. Under the new contracts, the rate would be increased to 16 cents per mcf as of November 1, 1954 (Pet. App. 2a). Following the *Phillips*

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[4] Orders No. 174–A and No. 174–B, both of which are involved in this proceeding, are in material respects identical. Order No. 174–B emphasized that the orders were procedural and non-substantive in nature, and went on to state (Pet. App. 106a):

> * * * We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

decision, petitioners filed on September 30, 1954, their 1948 contracts, which were still in force, and the new contracts (which were to become effective November 1, 1954) as initial rate schedules, pursuant to the regulations promulgated in Order No. 174–A. On October 29, 1954, the Commission ordered a hearing on the lawfulness of the proposed rate changes included in the new contracts, and suspended the rate increases for a period of five months from their effective date (Pet. App. 128a). When petitioners sought rehearing of the Commission's orders, the Commission, on December 7, 1954, reduced the suspension period to three months, but in other respects denied the applications for rehearing (Pet. App. 3a). The suspensions terminated on February 1, 1955, when the increased rates went into effect pursuant to bonds submitted by petitioners, as provided in Section 4 (e) of the Natural Gas Act (Pet. 12).

ARGUMENT

Petitioners make three contentions: (1) that Orders 174–A and 174–B issued by the Commission are reviewable prior to a Commission determination as to petitioners' status under the Act; (2) that an order setting a proposed rate increase for hearing and suspending the increase pending that hearing is a reviewable final order; and (3) that the Court of Appeals had jurisdiction to pass upon petitioners' status under the Natural Gas Act prior to Commission determination of that issue. Each of these contentions has been made in other petitions for certio-

rari by independent producers to which we have already responded, and each is without merit.

1. Petitioner's argument (Pet. 22–34) that procedural Orders 174, 174–A and 174–B are reviewable in a proceeding under Section 19 (b) of the Natural Gas Act is substantially the same as that advanced in the petition for certiorari in *Magnolia Petroleum Company* v. *Federal Power Commission,* No. 558, this Term, and the decision of the court below relies on its opinion in *Magnolia* in ruling on this aspect of the case. The discussion in the Commission's brief in opposition in *Magnolia* is fully applicable to this contention, and we respectfully refer the Court to that brief. See, also, the Commission's brief in opposition in *The Texas Company* v. *Federal Power Commission,* No. 583, this Term.[5]

2. Petitioners (Pet. 13–22) also urge that the two orders setting a hearing on their rate increases and suspending the increases are reviewable. In reject-

[5] Petitioners, in addition to asserting the same alleged conflicts of decisions as the petitioner in *Magnolia* (considered in the Commission's brief in opposition to that petition, No. 558, at pp. 15–17), also contend that the decision below conflicts with *G. J. Amshoff* v. *United States*, 228 F. 2d 261 (C. A. 7). That case involved the reviewability of a regulation of the Secretary of Agriculture interpreting the Packers and Stockyards Act of 1921 so as to apply to those particular petitioners. In contrast, Orders No. 174, No. 174–A and No. 174–B, as we show in our *Magnolia* brief, are procedural regulations of general applicability which expressly reserve the determination of the status of individual companies to subsequent proceedings. Since the *Amshoff* order was substantive in nature and amounted to a final ruling on the status of the complaining parties, that case has no bearing on the reviewability of the present orders.

ing this contention, the court below rested on its opinion in *Humble Oil and Refining Company* v. *Federal Power Commission,* pending on petition for certiorari, No. 530, this Term. The discussion in the Commission's brief in opposition in *Humble* is fully applicable on this point, and again, instead of setting forth the argument *in extenso,* we respectfully refer the Court to that brief.[6] See also the Commission's brief in opposition in *Hunt Oil Company* v. *Federal Power Commission,* No. 584, this Term.

3. Finally, petitioners contend (Pet. 34–43) that the Court of Appeals had jurisdiction, in the Section 19 (b) proceeding, to decide whether petitioners, or certain of their activities, were subject to the Natural Gas Act. It is clear, however, that this

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[6] Petitioners (Pet. 20–21) attempt to distinguish their case from *Humble* on the ground that their rate increases were provided in "new" contracts which became effective subsequent to the *Phillips* decision, whereas *Humble* involved rate changes pursuant to escalation clauses in contracts already in effect prior to that decision. This would, if anything, make it even clearer here than in *Humble* that the proposed increase came into effect subsequent to *Phillips* as well as after the date of the original filing by the company. In both cases, the effect of the suspension was to delay the effectiveness of the proposed increase for a limited time under the provisions of Section 4 (e) of the Act.

Petitioners argue (Pet. 21) that review could be had under Section 10 of the Administrative Procedure Act, although this issue is not raised in their statement of the question presented. It is clear, in any event, that Section 10 (c) of the Administrative Procedure Act, as well as Section 19 (b) of the Natural Gas Act, requires petitioners to exhaust their remedy before the Commission before challenging the validity of a preliminary order at an early stage in those hearings. See 5 U. S. C. 1009 (c) and *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499.

question must be decided in the first instance by the Commission, and that petitioners were required to exhaust their administrative remedies before the Commission and to make a record on which judicial review could properly be sought. See the Commission's brief in opposition in *Magnolia,* No. 558, this Term, pp. 10–15. As the court below stated (Pet. App. 5a–6a):

> * * * we deem it sufficient to say that the Commission, the administrative agency to which Congress delegated the power and duty of administering the Act, is the body entrusted with the initial determination of that fact, and no such determination has been made by it. The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. * * * Thus, until there has been a proceeding before the Commission, a record adduced, and an order issued declaring that petitioners are natural-gas companies within the meaning of the Natural Gas Act, and therefore subject to the jurisdiction of the Commission, this Court has no jurisdiction to act.

CONCLUSION

For the foregoing reasons, as well as those set out in the Commission's briefs in opposition in the pending cases to which we have referred, it is respectfully

submitted that this petition for a writ of certiorari should be denied.[7]

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
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Attorneys.

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General Counsel,
HOWARD E. WAHRENBROCK,
Assistant General Counsel,
Federal Power Commission.
DECEMBER 1956.

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[7] As in *Humble*, we suggest that, if the Court is of the view that the question as to the suspension orders (*supra*, pp. 8–9) is the same as that in *Amarillo-Borger Express, Inc.* v. *United States*, No. 224, this Term (a case which petitioners do not mention in their petition), this case might be set down together with *Borger* for argument on that issue alone, or held pending the disposition of *Borger* and *Humble*.

U. S. GOVERNMENT PRINTING OFFICE: 1956